

NO. 48095-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH TURNER,

Appellant.

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

The Honorable Erik D. Price, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to a fair trial when the prosecutor committed multiple acts of flagrant misconduct.

2. Appellant was denied effective assistance of counsel when defense counsel failed to object to the prosecutor's misconduct.

3. RCW 43.43.7541's DNA-collection fee and RCW 7.68.035's Victim Penalty Assessment (VPA) violate substantive due process when applied to defendants who have not been shown to have the ability, or likely future ability, to pay.

4. The trial court erred when it imposed a discretionary legal financial obligation (LFO) mistakenly believing it was mandatory.

5. Appellant was denied effective assistance of counsel when defense counsel misinformed the trial court that generic "court costs" were a mandatory LFO.

6. If the State seeks appellate costs, those should be denied.

Issues Pertaining to Assignments of Error

1. In her rebuttal argument, the prosecutor misstated the law as to its burden of proof and grossly misrepresented a key fact. She also misled the jury in its duty to independently determine credibility by directing that witness credibility was an all-or-nothing proposition. She also committed misconduct when she impugned the role of defense

counsel calling his challenge to the sufficiency of the evidence “insulting” and “offensive.” Finally, she gave a personal opinion as to the defendants’ veracity by calling their testimony as to a certain fact a “smear campaign.” The cumulative misconduct struck at the heart of the defense’s theories. Was this flagrant and prejudicial misconduct?

2. Defense counsel failed to object to the above stated misconduct. Did this constitute ineffective assistance of counsel?

3. RCW 43.43.7541 requires trial courts to impose a DNA-collection fee each time a felony offender is sentenced. This ostensibly serves the State’s interest in funding the collection, testing, and retention of a convicted defendant’s DNA profile. RCW 7.68.035 requires trial courts to impose a VPA of \$500. The purpose is to fund victim-focused programs. These statutes mandate that trial courts order these LFOs even when the State has not shown the defendant the ability to pay or the likely future ability to pay. Do the statutes violate substantive due process?

4. Because of appellant’s indigent status, the trial court decided to waive discretionary LFOs. However, it mistakenly believed generic “court costs” were a mandatory fee. Did the trial court fail to recognize and exercise its discretion when it ordered appellant to pay \$200 in court costs because it mistakenly thought it was a mandatory LFO?

5. Defense counsel wrongly informed the trial court that generic “court costs” were a mandatory fee. The trial court imposed that fee but waived all discretionary fees. Did appellant receive ineffective assistance of counsel?

6. Appellant is indigent. Should this Court deny appellant costs if they are requested?

B. STATEMENT OF THE CASE

1. Procedural History

On February 2, 2014, the Thurston County prosecutor charged appellant Kenneth Turner with one count of second degree robbery and one count of second degree theft of an access device. CP 2. On October 29, 2014, the state dropped the robbery charge and, instead, added one count of third degree malicious mischief. CP 3.

A jury found Turner not guilty of malicious mischief, but guilty of theft. CP 11-12. He was sentenced to 17 months of confinement and ordered to pay a \$500 VPA, a \$100 DNA-collection fee, and \$200 for generic “court costs.” CP 40-49. The State also asked for witness costs. 2RP 5.¹ Based on Turner’s indigence, the trial court declined to impose

¹ “2RP” refers to the sentencing transcript, which is paginated separately from the multi-volume trial transcript.

witness costs. 2RP at 17. Turner timely appeals his convictions and the order imposing LFOs. CP 50-51.

2. Substantive Facts.

On June 1, 2014, Turner went to a club in downtown Olympia with his girlfriend, Tanya Satak. RP 521. They were joined by Turner's friend, Rob Simerly. RP 608-09. Satak and Turner believed Simerly was high on methamphetamine that night. RP 551-53, 609-10.

Kylie Thorson, her husband, and a group of friends were also at the club. RP 121, 270. While there, Thorson wore a wristlette attached to her arm by a strap. RP 269. It contained among other things, an iPhone and two credit cards. RP 269-70.

At one point, Turner was approached by Thorson's friends and words were exchanged. One of Thorson's friends used the "N" word and threw a drink on Turner. RP 183, 227-28, 270, 523-25, 613-14. When one of the men in Thorson's group passed his drink in order to free his hands, Turner felt threatened and punched him. RP 614-15. Security escorted Turner out of the club. RP 616.

In the parking lot, Turner was looking for Satak and Simerly when Thorson's husband and the man Turner punched came around the corner to continue the fight. RP 616-17. Thorson and her friends exited the club and watched the fight. RP 67.

Meanwhile, Satak and Simerly went to Satak's car and attempted to back it out so they could pick up Turner and leave. RP 232. Unbeknownst to Satak, however, Thorson and a friend were standing behind the car. RP 531. Thorson claimed the car tapped her. RP 274. She angrily smacked the top of the trunk. RP 96, 233, 531. Satak got out and confronted her. RP 534. Thorson hit Satak in the face with her wristlette, so Satak tased Thorson. RP 71, 534-34, 559. Afterward, Satak and Turner quickly got in the car with Simerly and left. RP 534, 618.

During the altercation with Satak, Thorson lost her wristlette. RP 71. It apparently landed next to the passenger door of Satak's car. RP 71, 280. Satak and Turner testified that Turner never took the wristlette or its contents. RP 534, 561, 569, 619, 628. Thorson was the only person who claimed to have seen Turner take the wristlette. RP 269. Others in her group were watching the incident, but none saw Turner pick up the wristlette. RP 74, 89, 150, 196.

Although Thorson claimed to have seen Turner take the wristlette, after Satak's car left the parking lot, she asked for a flashlight and searched the area for her wristlette. RP 330. When she did not find it, Thorson borrowed another phone and used it to track her own phone through a locater app. RP 284.

Meanwhile, Simerly guided Satak to his house. RP 535. Once there, Simerly removed his car from the garage so Satak could park her car in it. RP 536. Satak and Turner testified that once they were inside the house, Simerly produced Thorson's cell phone from his pocket. RP 536, 566. Wanting to get rid of the phone, Simerly went into to the garage, destroyed the phone with a hammer, and placed it in a trash bag.² RP 538-39, RP 568.

Meanwhile, police tracked the phone to Simerly's house. RP 360. When Simerly came out of the house holding the trash bag with Thorson's busted phone in it, they were waiting. RP 424-28. After a show-up identification by Thorson, all three were arrested – although Simerly was quickly released after he gave a statement to police implicating Turner.³ RP 361, 390. Thorson identified her phone as the one in the garbage can. RP 417. Thorson's credit cards were never located. RP 385.

² Simerly testified that the wristlette with the cell phone was in the car during the ride home, but he thought it was Satak's purse. RP 240. He speculated that some of the contents were discarded out the window while they were driving. RP 241. He claimed that after they arrived at his house, Turner destroyed the phone with the hammer and told him to throw it away. RP 244-45, 248.

³ Simerly was never charged. Turner was charged and convicted as set forth above. Satak was charged and convicted of fourth degree assault.

C. ARGUMENT

I. TURNER WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR COMMITTED MULTIPLE ACTS OF FLAGRANT MISCONDUCT.

Turner was denied his right to a fair trial when the prosecutor committed multiple acts of misconduct during closing argument that resulted in an enduring prejudice to the outcome of the case.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011). Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics. Monday, 171 Wn.2d at 676 (citing State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956)).

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Id. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675, (citations omitted). Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 578.

Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be flagrant and ill-intentioned. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). However, if the misconduct is flagrant, the petitioner has not waived his right to review of the conduct. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978). In such cases, reversal is required if the misconduct caused an enduring and resulting prejudice. State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307, 311 (2008).

Here, the prosecutor flagrantly misstated the law as to what the State was required to prove in order to support a conviction for theft of an access device and misrepresented a key fact. The prosecutor also misrepresented to the jury that its decision as to witness credibility was an all-or-nothing proposition (i.e. it had to either find the witness was lying about everything or was truthful about everything). She also committed misconduct when she impugned the role of defense counsel and gave a personal opinion as to the defendants' veracity.

(i) Misstatement of the State's Burden of Proof and Misrepresentation of the Facts

1. Relevant facts

Thorson testified she possessed two credit cards in her purse when it was stolen, which she canceled after the incident. RP 269-70, 291. She never testified to using those credit cards to purchase anything of value, and she specifically stated she had paid in cash. RP 270, 304.

During closing argument, defense counsel argued that the State had not shown that Thorson's credit cards were "access devices." RP 752-56. He argued that before the jury could conclude the cards were access devices as defined by law, the State was required to prove beyond a reasonable doubt that Thorson's credit cards were able to be used to obtain anything of value. Id. Defense counsel also warned that the State may try to claim the defense's focus on the usability factor was merely a "red herring." RP 752. He emphasized, however, that the State had to prove the credit cards were an access device and it did not do so. RP 752.

Specifically, defense counsel pointed out there was no testimony establishing the cards were active for use (i.e. not expired or maxed out). RP 754. He underscored the fact the State had not provided any receipts or credit card statements to show the cards were tied to an active account. RP 753-54. Instead, the State offered only a vague assumption that

Thorson's credit cards must have been useable because she was carrying them. RP 753, 755. Defense counsel pointed out that mere possession of a credit card is insufficient to prove the card could be used to purchase something of value. RP 755-56.

In her rebuttal, the prosecutor responded to this argument in the following manner:

I want to touch on the access device, and I think this is important. First of all, I have never used the phrase "red herring" in my life. That is not how I talk. But more importantly, that's white noise, and it's a ridiculous argument, and it isn't a burden I have to prove to you, but be very clear, you do have evidence. Kylie specifically told you that not only did she have those items but she used those items to pay for drinks at the club, very specifically. There is no requirement, as you will see in your instructions, for bank statements, for credit card statements. That is insulting and it's offensive.

RP 783 (Emphasis added).

2. Legal Argument

A prosecutor commits misconduct by misstating the law regarding the State's burden of proof. State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996); State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). This is because "[t]he prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury." State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213, 1217 (1984).

Additionally, a prosecutor commits misconduct by urging the jury to convict based on evidence outside the record. State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, it is improper for a prosecutor to make arguments based on facts not in evidence or to misrepresent the facts. Belgarde, 110 Wn.2d at 507–08.

Here, the prosecutor misstated the law, lessening the State’s burden of proof, and misrepresented the law when she stated the State had no burden to prove the access device could be used to obtain something of value and also misstated the facts when she claimed there was proof Thorson had used the credit cards that evening.

The State has the burden to prove the usability of credit cards when it seeks a conviction for theft of an access device under RCW 9A.56.040(1)(d). For purposes of that statute, “access device” is defined as:

any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.

RCW 9A.56.010(1) (emphasis added).

The Washington Supreme Court recently overturned a conviction for insufficient evidence where the State failed to show a stolen credit card could be used to obtain something of value at the time the card was stolen. State v. Rose, 175 Wn.2d 10, 12, 282 P.3d 1087 (2014). In Rose, the defendant stole a credit card solicitation that included an inactivated MasterCard credit card. Id. at 14-15. The credit card looked like an active credit card. On its face, the card had an account number, the account holder's name, and an expiration date. Id. It also had a signature block and a three-digit security code on the back. Id.

The Supreme Court held that in order to prove the credit card was an "access device" as defined under RCW 9A.56.010(1), it was the State's burden to prove the card's usability at the time it was taken. The Supreme Court reasoned that the mere existence of a credit card was not necessarily proof beyond a reasonable doubt that it was an "access device" that could be used to obtain something of value. Id. at 18. The State needed proof the card Rose possessed was tied to an active account in order to prove it could be used to obtain something of value. Id. at 18.

Given the holding in Rose, the prosecutor here was absolutely incorrect when she told the jury the State had no burden to prove Thorson's credit cards could be used to obtain something of value when they were taken. While the State may not have been required to produce

credit card statements or receipts, it was still required to prove beyond a reasonable doubt the usability of Thorson's card. Hence, it was patently improper for the prosecutor to tell the jury it had no burden to do so.

Not only did the prosecutor misstate the law to the State's benefit, but she compounded this serious error by also misrepresenting the facts. The prosecutor argued that, even though the State had no burden to prove usability, the State had presented evidence that the cards were used by Thorson that night to buy drinks. However, the record shows this was not so.

While Thorson testified she had two credit cards in her purse (RP 269-70), the State never established whether Thorson used her cards that night. In fact, when the prosecutor asked Thorson how she paid, Thorson specifically stated she paid cash. RP 270. As such, the prosecutor's representation of the facts was patently incorrect and seriously misleading as to a core issue in dispute.

The prosecutor's misstatement of the law as to the State's burden of proof and her blatant misrepresentation of the facts was flagrant misconduct. As shown below, this misconduct struck at the heart of the defense and resulted in an enduring prejudice that likely affected the jury's verdict.

(ii) Misleading the Jury in its Duty to Independently Determine Credibility

1. Relevant Facts

During closing argument, defense counsel addressed Simerly's motive for shifting the blame to Turner, emphasizing that Simerly's testimony was not credible because he was biased by his own self-interest to avoid a criminal charge. RP 748-750. Conversely, Satak's counsel emphasized that Simerly was credible when he testified that Thorson and her friends were egging on the fight and had used the "N" word. RP 768.

In response, the prosecutor addressed the defenses' arguments as to Simerly's credibility, stating:

You cannot have it both ways. Either he is lying about everything or he is telling the truth about everything, but you can't pick and choose the parts that help you and the parts that hurt you, and that's what they want you to do.

RP 782.

2. Legal argument

The law is well settled that determinations of credibility are solely for the jury. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The jury's exclusive realm of deciding witness credibility must be protected from invasion. State v. Green, 182 Wn. App. 133, 155-56, 328 P.3d 988, 999 (2014).

Judging the credibility of a witness is not an all-or-nothing proposition. State v. Carothers, 9 Wn. App. 691, 693, 514 P.2d 170, 172 (1973); Munoz-Monsalve v. Mukasey, 551 F.3d 1, 8 (1st Cir. 2008); United States v. Cassidy, 6 F.3d 554, 557 (8th Cir.1993); State v. Cola, 77 Ohio App. 3d 448, 452, 602 N.E.2d 730, 733 (Ohio Ct. App. 1991). In reaching its verdict, it is the jury's duty to weigh all of the evidence, credit or discredit the testimony as it sees fit, and draw reasonable inferences from the evidence while rejecting other possible inferences. James v. Robeck, 79 Wn.2d 864, 870, 490 P.2d 878 (1971). The fact finder is permitted to credit each witness's testimony in whole or in part and accord different weight to different pieces of testimony. Munoz-Monsalve, 551 F.3d at 8.

Here, the prosecutor invaded the province of the jury and diverted the it away from its duty to be the sole determiner of credibility by telling them they had to believe all or none of the witness' testimony. In essence, she told the jury that credibility was an all-or-nothing proposition. This is incorrect.

The jury is permitted to find some aspects of a witness' testimony credible, but not others. In fact, the jury has the duty to independently weigh the facts as it sees fit without being bound by the type of all-or-nothing formula set forth by the prosecutor. Despite this, the prosecutor

implied it was improper for the jury to consider credibility on a fact-by-fact basis. As such, the prosecutor's misleading rhetoric served no other purpose than to divert the jury from its duty to independently assess witness credibility and weigh the evidence as it saw fit.

As explained further below, the prosecutor's statement that credibility is an all-or-nothing proposition touched upon a core issue in dispute and an issue central to the resolution of this case. Hence, the prosecutor's misconduct in diverting the jury from its duty, whether standing alone or in conjunction with other misconduct, resulted in enduring prejudice.

(iii) Impugning the Role and Integrity of Defense Counsel and Giving a Personal Opinion about the Defendants' Veracity.

1. Relevant Facts

Both Turner and Satak testified that Simerly looked to be high on methamphetamine at the time of the incident. RP 551-52, 557, 609-10. Contrarily, Officer Brenda Anderson testified that she did not detect any indications Simerly was high when she interviewed him a few hours later. RP 655-56.

During closing argument, Turner's counsel addressed the issue of Simerly's being high when discussing bias, suggesting that Turner and Satak's observations of Simerly were more reliable than Anderson's

opinion because they had previously observed Simerly high on meth and knew what he acted like, while Anderson had not. RP 745. In response, the prosecutor argued that the officer's testimony was more credible due to her experience in detecting impairment. RP 781. The prosecutor did not stop there, however. RP 782. Instead, she went on to claim that the defendants' testimony that Simerly was high amounted to nothing more than a "smear campaign."⁴ RP 782.

Later, when responding to the defense's argument that the jury should question whether the State had produced sufficient evidence that the access device could be used to obtain something of value (RP 752-56), the prosecutor claimed that defense counsel's arguments were "insulting" and "offensive." RP 783.

2. Legal Argument

It is improper for the prosecutor to assert a personal opinion about a witness' credibility. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). It is also misconduct for the prosecutor to impugn the role or integrity of defense counsel. State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014).

⁴ Specifically the prosecutor referred to Satak's testimony, but the negative implication applied with equal force to Turner who had testified to the same facts that the prosecutor was calling a smear campaign.

A prosecutor can argue that the evidence does not support the defense theory. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). However, the prosecutor must do so without impugning the role or integrity of defense counsel or giving a personal opinion about a witness' veracity. Warren, 165 Wn.2d at 29–30; State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993). For example, a prosecutor commits misconduct by referring to the defense's case as “bogus” or “involving ‘sleight of hand’” because such language implies “wrongful deception or even dishonesty in the context of a court proceeding.” Thorgerson, 172 Wn.2d at 438, 451–52, 258 P.3d 43 (2011). Prosecutorial statements that malign defense counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible. Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir.1983).

Here, the prosecutor stated that the defendants' testimony that Simerly was high on drugs the night of the incident was a “smear campaign.” Used in this context, the word “smear” means: “an untrue story about a person that is meant to hurt that person's reputation.”⁵ More specifically “smear campaign” means: “a strategy to discredit a person ... through disparaging remarks or false accusations.”⁶ In essence, the

⁵ “Smear.” Merriam-Webster.com. Merriam-Webster, n.d. 09 Mar. 2016.

prosecutor told the jury she believed the defendants were liars and engaged in a concerted effort to wrongfully deceive the jury. As such, the prosecutor committed misconduct when she characterized this line of defense as a “smear campaign.”

Additionally, the prosecutor disparaged defense counsel by stating his arguments regarding sufficiency of the evidence were “insulting” and “offensive.” It is the duty of defense counsel to zealously represent the defendant, and it is his role to question whether the State has met its burden of proof. Thus they serve an important role in the criminal process. Fair and reasoned arguments challenging the sufficiency of the State’s evidence should never be characterized by the State as insulting and offensive. Instead, they are essential to holding the State to its constitutional burden. The prosecutor’s negative portrayal of defense counsel’s role as offensive and insulting served no other purpose than to malign his integrity and disrupt the fairness of the trial process.

As such it was flagrant misconduct that, as shown below, prejudiced the outcome of the case.

⁶ “Smear campaign.” Dictionary.com's 21st Century Lexicon. Dictionary.com, LLC. 09 Mar. 2016. <Dictionary.com <http://www.dictionary.com/browse/smear-campaign>>.

(iv) Prejudice

There are two standards for determining prejudice stemming from prosecutorial misconduct. If there has been an objection, prejudice is established when there is a substantial likelihood that the misconduct affected the jury's verdict. Monday, 171 Wn.2d at 578. If defense counsel failed to object, there is a heightened standard. The defendant must show not only that the misconduct likely effected the jury, but also that the conduct was so flagrant or ill-intentioned that it evinces an enduring prejudice that could not have been cured by an instruction to the jury. In re Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673, 678 (2012).

The cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions could erase their combined prejudicial effect. State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011). In such cases, reversal is required. In re Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673(2012). This is one of those cases.

Turner's defense rested on two theories: (1) Thorson's and Simerly's testimony that Turner took or possessed the purse was not credible, and (2) there was insufficient evidence to show beyond a reasonable doubt the credit cards could have been used to obtain something of value.

Looking at the defendant's first theory, the jury's assessment of credibility was central to the outcome in this case. Both Satak and Turner testified that Turner did not take the wristlette or its contents. However, Thorson said he did, and Simerly claimed Turner had the wristlette.

The prosecutor told the jury that it had to believe all or none of what these witnesses said. Hence, if the jury believed Thorson was telling the truth about being tased, the jury was told it had to believe she was also telling the truth about seeing Turner take her wristlette. Yet, there were many other witnesses who were present and did not see Turner take the wristlette. There was also evidence that Thorson was still looking for the wristlette on the ground even after she claimed to have seen Turner take it.

Based on this record, a reasonable juror -- who was not misled into thinking that credibility is an all-nothing proposition -- could have believed Thorson was credible about saying she was tased, while at the same time, disbelieving her testimony about seeing Turner take the wallet. Unfortunately, the prosecutor's misconduct led jurors into believing that that was a not a proper way to determine credibility.

Moreover, the prosecutor invaded the province of the jury to independently evaluate credibility when she offered her personal opinion that the defendants were liars who were engaged in a smear campaign against Simerly. When a verdict comes down to a question of who were

most credible – the State’s witnesses or the defendants – it is particularly prejudicial for the prosecutor to suggest the defendants are liars, especially when it serves to bolster the credibility of its own witness. That is what occurred here.

Turning to the Turner’s second theory, the prejudice resulting from the prosecutor’s misconduct was significant because the State’s proof of usability was particularly thin here. The only evidence the State offered in this regard was the fact that Thorson possessed the cards and had cancelled them after the incident. The State failed to ask Thorson whether there was available credit tied to the cards or whether they were unexpired. It did not provide any physical evidence establishing these facts. More importantly, there was no evidence from any state’s witness – including Thorson – establishing that Thorson used those cards that night, or at any other time, to obtain something of value.

Without evidence that there was available credit or the cards were not expired, a reasonable juror might have concluded the State had not met its burden. Perhaps the jury might have been willing to infer from possession and cancellation that the cards could have been used to obtain something of value; however, due to the prosecutor’s misconduct it never had to get to that question. The prosecutor stated this was not the State’s burden.

Even though the jury was given the definition of an access device in its instructions, there is still a significant possibility the jury might have believed the prosecutor's claim that she did not have to prove usability. The usability element was not explicitly set forth in the to-convict instruction but was instead buried in the middle of an instruction defining access device. CP 26, 29. It is not unreasonable for the jury to believe that the prosecutor is an expert on the State's burden and would not say she did not have to prove something when she did. Hence, they could have easily overlooked this element when deciding whether the elements in the to-convict instruction were met. As such, the misconduct was highly prejudicial.

Moreover, even if the jury had ignored the prosecutor's misstatement of the law and decided that it needed to consider the question of usability, it was then confronted by the prosecutor's gross misrepresentation of the facts. The prosecutor stated that Thorson said she used the cards on the night of the incident. The record does not show this; however, there is still a strong possibility the jury was confused and misled by the prosecutor's misrepresentation.

The prosecutor is the master of the State's case and is presumably the most informed as to the testimony of the State witnesses. Thus, the jury may have been easily swayed by the prosecutor's recollection of the

facts. If it accepted the prosecutor's misrepresentation as to Thorson's testimony as true, it would have never needed to consider whether the slight facts that were in evidence (mere possession and cancellation) supported an inference of usability. Instead, it would have rendered a verdict based upon a fact the State never actually proved. As such, there is a substantial likelihood that the prosecutor's misconduct regarding this element affected the verdict.

Furthermore, a curative instruction could not have effectively addressed the relentless misconduct of the prosecutor. The prosecutor knew the law and her burden. Yet, she still misrepresented that she did not have the burden to prove usability. The prosecutor was in the courtroom when Thorson said she used cash on the night of the incident. Yet, she misrepresented that fact. It is common knowledge calling someone's testimony a "smear campaign" conveys that the speaker believes the witness is a liar. Yet, the prosecutor made that claim. The prosecutor knew the role of defense counsel is to challenge the sufficiency of the state's evidence, yet she claimed that to do so was insulting and offensive. Presumably, the prosecutor knew credibility is not an all-or-nothing proposition. Yet, she misled the jury as to this too. If all this knowledge did not prevent the prosecutor from engaging in unfair tactics

to derail the fairness of the trial process, it is doubtful that a curative instruction would have done so either.

More importantly, to offer curative instructions on all of these acts of misconduct would have certainly made the instructions to the jury intolerably convoluted and confusing. While the jury can be assumed to follow instructions, at some point asking them to set aside so much misconduct by the prosecutor is simply not effective.

Curative instructions can only go so far before the jury's ability to effectively compartmentalize is stretched beyond its capacity. See e.g. State v. Stith, 71 Wn. App. 14, 22-23, 856 P.2d 415 (1993). In Stith, although the trial court gave a curative instruction, the appellate court held the prosecutor's misconduct was "so prejudicial" that "[o]nce made, such remarks cannot be cured." *Id.* at 22-23. A defendant's right to a fair trial should not rest precariously on whether the jurors are good at compartmentalizing and ignoring repeated prosecutorial misconduct.

For the reasons stated above, this Court should find there is a substantial likelihood that the prosecutor's multiple acts of misconduct affected the jury's verdict and that the cumulative effect of the misconduct was so flagrant that it could have been cured with an instruction.

II. TURNER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO OBJECT TO MULTIPLE ACTS OF MISCONDUCT.

Even if this Court decides the prosecutor's misconduct was not flagrant and could have been cured with an instruction to the jury, this Court should still reverse on ineffective assistance of counsel grounds.

The Sixth Amendment guarantees the right to effective counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "This right exists, and is needed, in order to protect the fundamental right to a fair trial." Id. at 684. Ineffective assistance of counsel is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting two-prong test from Strickland, 466 U.S. at 687). As shown below, both prongs are satisfied here.

"Counsel ... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Counsel fails to render constitutionally required effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. Hawkman v. Parratt, 661 F.2d 1161 (8th Cir.1981). Thus, deficient performance occurs when counsel's conduct falls below an

objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

Competent defense counsel must be aware of the law and should make timely objections when the prosecutor crosses the line during closing argument and jeopardizes the defendant's right to a fair trial. State v. Neidigh, 78 Wn. App. 71, 79-80, 895 P.2d 423 (1995).

Here, counsel's performance was deficient because he failed to object. Competent counsel would not have sat by and quietly watched while the prosecutor gave her personal opinion that the defendants were putting forth a smear campaign. Nor would competent counsel have failed to object to the prosecutor's characterization of his role in challenging the sufficiency of the State's evidence as insulting and offensive. He also would not have silently watched the prosecutor's attempt to frame credibility as an all-or-nothing proposition.

Given the defense, competent counsel would not have allowed the State to lighten its burden by misstating the law regarding the element of usability without an objection and asking for a clarifying instruction. And he certainly would have objected to the State's misrepresentation of a material fact as to whether the credit cards were used that night. There was no tactical advantage to not objecting to the misconduct. As such, defense counsel's performance was objectively unreasonable.

Counsel's deficient performance prejudiced the defense. Prejudice occurs if there is a reasonable probability that the result would have been different, had the deficient performance not occurred. Thomas, 109 Wn.2d at 226. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. That is the case here.

As stated above, the defense presented two key theories: (1) Thorson and Simerly were not credible witnesses and without them there was no evidence Turner took the wristlette, and (2) the State failed to sufficiently prove the credit cards could have been used to obtain something of value. The misconduct struck at the heart of these defenses. As explained in detail above – given the erroneous, persistent, and confusing nature of the prosecutor's comments and the State's weak evidence, there is a reasonable probability the outcome of the case would have been different had defense counsel objected to the misconduct.

Also as explained above, the State's case was particularly weak in regard to whether the credit cards were usable. Also, there was conflicting testimony as to whether Turner took the wallet. The prosecutor's unchecked misconduct impacted the jury's ability fairly consider the evidence and render an impartial verdict on these factors. This alone

establishes prejudice and merits reversal for ineffective assistance of counsel.

Moreover, by not objecting, defense counsel also prejudiced Turner's ability to obtain relief on appeal. But for counsel's deficient performance, Turner would have had a less rigid standard to meet when showing he was prejudiced by prosecutorial misconduct. Without an objection, Turner is saddled with the higher standard. Instead of just having to prove that there was a substantial likelihood that the misconduct affected the outcome of the case, Turner has to show that the misconduct could not have been cured by additional instruction. Hence, if this Court finds that Turner is able to meet the lower standard but not the higher standard, it should reverse for ineffective assistance of counsel because this establishes Turner was prejudiced by defense counsel's deficient performance. See e.g. In re Pers. Restraint of Morris, 176Wash.2d 157, 288 P.3d 1140 (2012) (prejudice prong for ineffective assistance of counsel claim established because Morris would have been entitled to reversal had appellate counsel raised the public trial right issue on direct appeal).

III. RCW 43.43.7541 AND RCW 7.68.035 ARE UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE ABILITY, OR LIKELY FUTURE ABILITY, TO PAY LFOS.

RCW 9.94A.760 permits the trial court to impose costs “authorized by law” when sentencing an offender for a felony. RCW 43.43.7541 authorizes the collection of a \$100 DNA-collection fee. RCW 7.68.035 provides that a \$500 VPA “shall be imposed” upon anyone who has been found guilty in a Washington Superior court. However, these statutes violate substantive due process when applied to defendants, like Mr. Turner, who are not shown to have the ability or likely future ability to pay the fine. Hence, this Court should find the trial court erred in imposing those fees without first determining Turner’s ability to pay.

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV, § 1; Wash. Const. art. I, § 3. “The due process clause of the Fourteenth Amendment confers both procedural and substantive protections.” Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” Id. at 218–19. It requires that

“deprivations of life, liberty, or property be substantively reasonable;” in other words, such deprivations are constitutionally infirm if not “supported by some legitimate justification.” Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221, 1225 (2013) (citing Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. Johnson v. Washington Dept of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130, 1135 (2013). Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. Id. Although the burden on the State is lighter under this standard, the standard is not meaningless. Indeed, the United States Supreme Court has cautioned the rational basis test “is not a toothless one.” Mathews v. DeCastro, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, “the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional.” DeYounq v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining the statute at issue did not survive

rational basis scrutiny); Nielsen, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

Turning first to RCW 43.43.7541, the statute mandates all felony defendants pay the DNA-collection fee. This ostensibly serves the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752-7541. This is a legitimate interest. However, the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

As for RCW 7.68.035, it mandates that all convicted defendants pay a \$500 VPA. This ostensibly serves the State's interest in funding "comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes." RCW 7.68.035(4). Again, while this may be a legitimate interest, there is nothing reasonable about requiring sentencing courts to impose the VPA upon defendants regardless of whether they have the ability – or likely future ability – to pay.

Imposing these fees does not further the State's interest in funding DNA collection or victim-focused programs. For as the Washington Supreme Court recently emphasized, "the state cannot collect money from defendants who cannot pay." State v. Blazina, 182 Wn.2d 827, 344 P.3d

680, 684 (2015). Hence, there is no legitimate economic incentive served in imposing these LFOs.

Likewise, the State's interest in enhancing offender accountability is also not served by requiring a defendant to pay mandatory LFOs when he does not have the ability to do so. In order to foster accountability, a sentencing condition must be something that is achievable in the first place. If it is not, the condition actually undermines efforts to hold a defendant answerable.

The Supreme Court also recognizes that the State's interest in deterring crime via enforced LFOs is actually undermined when LFOs are imposed on people who do not have the ability to pay. *Id.* This is because imposing LFOs upon a person who does not have the ability to pay actually "increase[s] the chances of recidivism." *Id.* at 836-37 (citing relevant studies and reports).

Likewise, the State's interest in uniform sentencing is not served by imposing mandatory LFOs on those who do not have the ability to pay. This is because defendants who cannot pay are subject to an undeterminable length of involvement with the criminal justice system and often end up owing much more than the original LFOs imposed (due to interest and collection fees), and in turn, considerably more than their wealthier counterparts. *Id.* at 836-37.

When applied to indigent defendants, not only do the so-called mandatory fees ordered under RCW 43.43.7541 and RCW 7.68.035 fail to further the State's interest, they are utterly pointless. It is simply irrational for the State to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue appellant's due process challenge is foreclosed by the Washington Supreme Court's rulings in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) and State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), which conclude due process was not violated by imposition of the VPA regardless of whether there was an ability-to-pay inquiry. However, the "constitutional principles" at issue in those cases were very different than those implicated here. Hence, any reliance on these cases would be misplaced.

Turner's constitutional challenge to the statute authorizing the DNA-collection fee and VPA is fundamentally different from that raised in Curry. In Curry, 118 Wn.2d at 917, the defendants challenged the constitutionality of a mandatory LFO order on the ground that its enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they are unable to pay LFOs. Hence, Curry's constitutional challenge was grounded in the well-established

constitutional principle that due process does not tolerate the incarceration of people simply because they are poor. Id.

By contrast, Turner asserts there is no legitimate state interest for requiring sentencing courts to impose a mandatory DNA-collection fee without the State first establishing the defendant's ability to pay. In other words, rather than challenging the constitutionality of the LFO statute based on the fundamental unfairness of its ultimate enforcement potential (as was the case in Curry and Blank), Turner challenges the statute as an unconstitutional exercise of the State's regulatory power that is irrational when applied to defendants who have not been shown to have the ability to pay. As such, the holdings in Curry and Blank do not control.

The State's reliance on Curry and Blank would also be misplaced because when those cases are read carefully and considered in the light of the realities of Washington's current LFO collection scheme, they actually support Turner's position that an ability-to-pay inquiry must occur at the time the LFO is imposed. Indeed, after Blazina's recognition of Washington State's "broken LFO system," 182 Wn.2d at 835, the Washington Supreme Court's holdings in Curry and Blank must be revisited in the context of Washington's current LFO scheme.

Currently, Washington's laws set forth an elaborate and aggressive collections process which includes the immediate assessment of interest,

enforced collections via wage garnishment, payroll deductions, and wage assignments (which include further penalties), and potential arrest. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families. See, Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J. Soc. 1753, (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay).

Washington's legislatively sanctioned debt cycle does not conform to the necessary constitutional safeguards established in Blank. In Blank the Washington Supreme Court held that "monetary assessments which are mandatory may be imposed against defendants without a per se constitutional violation." Blank, 131 Wn.2d at 240 (emphasis added). The Court reasoned that fundamental fairness concerns only arise if the government seeks to enforce collection of the assessment and the defendant is unable, though no fault of his own, to comply. Id. at 241 (referring to Curry, 118 Wn.2d at 917-18).

The Washington Supreme Court also noted, however, that the constitutionality of Washington's LFO statutes was dependent on trial courts conducting an ability-to-pay inquiry at certain key times. It emphasized the following triggers for this inquiry:

- “The relevant time [to conduct an ability-to-pay inquiry] is the point of collection and when sanctions are sought for nonpayment.” Id. at 242.
- “[I]f the State seeks to impose some additional penalty for failure to pay...ability to pay must be considered at that point. Id.
- “[B]efore enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay.” Id.

Blank thus makes clear that in order for Washington’s LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry before: (1) the State engages in any “enforced” collection; (2) any additional “penalty” for nonpayment is assessed; or (3) any other “sanction” for nonpayment is imposed.⁷ Id. Unfortunately, neither the Legislature nor the courts are currently complying with Blank’s directives.

Given Washington’s current LFO collection scheme, the only way to regularly comply with Blank’s safeguards is for sentencing courts to conduct a meaningful ability-to-pay inquiry at the time the DNA-collection fee and VPA are imposed. Although Blank says that prior case

⁷ “Penalty” means: “a sum of money which the law exacts payment of by way of punishment for... not doing some act which is required to be done.” Black’s Law Dictionary, Sixth Edition, at 1133.

“Sanction” means: “Penalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations.” Id., at 1341.

“Enforce” means: “To put into execution, to cause to take effect, to make effective; as to enforce ... the collection of a debt or a fine.” Id. at 528.

law suggests that such an inquiry is not required at sentencing, the Supreme Court was not confronted with the realities of the State's current collection scheme in that case. As shown below, Washington's LFO collection scheme provides for immediate enforced collection processes, penalties, and sanctions. Consequently, Blank actually supports the requirement that sentencing courts conduct an ability-to-pay inquiry during sentencing when the DNA-collection fee and VPA are imposed.

First, under RCW 10.82.090(1), LFOs accrue interest at a compounding rate of 12 percent – an astounding level given the historically low interests rates of the last several years. Blazina, 182 Wn. 2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013)). Interest on LFOs accrues from the date of judgment. RCW 10.82.090. This sanction has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be decades. See, Harris, supra at 1776-77 (explaining that “those who make regular payments of \$50 a month toward a typical legal debt will remain in arrears 30 years later). Yet, there is no requirement for the court to have conducted an inquiry into ability to pay before interest is assessed.

Washington law also permits courts to order a “payroll deduction.” RCW 9.94A.760(3). This can be done immediately upon sentencing. RCW 9.94A.760(3). Beyond the actual deduction to cover the outstanding LFO payment, employers are authorized to deduct other fees from the employee's earnings. RCW 9.94A.7604(4). This constitutes an enforced collection process with an additional sanction. Yet, there is no provision requiring an ability-to-pay inquiry to occur before this collection mechanism is used.

Additionally, Washington law permits garnishment of wages and wage assignments to effectuate payment of outstanding LFOs. RCW 6.17.020; RCW 9.94A.7701; see also, Harris, supra, at 1778 (providing examples of wage garnishment as an enforcement mechanism used in Washington). As for garnishment, this enforced collection may begin immediately after the judgment is entered. RCW 6.17.020. Wage assignment is a collection mechanism that may be used within 30 days of a defendant’s failure to pay the monthly sum ordered. RCW 9.94A.7701. Again, employers are permitted to charge a “processing fee.” RCW 9.94A.7705. Contrary to Blank, however, there are no provisions requiring courts to conduct an ability-to-pay inquiry prior to the use of these enforced collection mechanisms.

Washington law also permits courts to use collections agencies or county collection services to actively collect LFOs. RCW 36.18.190. Any penalties or additional fees these agencies decide to assess are paid by the defendant. Id. There is nothing in the statute that prohibits the courts from using collections services immediately after sentencing. Yet, there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement. Id.

The examples set forth above show that under Washington's currently "broken" LFO system, there are many instances where the Legislature provides for "enforced collection" and/or additional sanctions or penalties without first requiring an ability-to-pay inquiry. Some of these collection mechanisms may be used immediately after the judgment and sentence is entered. If the constitutional requirements set forth in Curry and Blank are to be met, trial courts must conduct a thorough ability-to-pay inquiry at the time of sentencing when the LFOs are imposed. As such, any reliance on holdings of Curry and Blank by the State would be specious because Washington's current LFO system does not meet the constitutional safeguards mandated in those holdings.

In sum, Washington's LFO system is broken in part because the courts have not followed through with the constitutional requirement that LFOs only be imposed upon those that have the ability – or likely ability –

to pay. It is not rational to impose a fee upon a person who does not have the ability to pay. Hence, when applied to defendants such as Mr. Turner who have not been shown to have the ability to pay LFOs, the mandatory imposition of the DNA-collection fee and VPA does not reasonably relate to the State interests served by those statutes. Consequently, this Court should find RCW 43.43.7541 and RCW 7.68.035 violate substantive due process and vacate the LFO order.

IV. THE TRIAL COURT ERRED WHEN IT IMPOSED A NON-MANDATORY “COURT COSTS” FEE, MISTAKENLY BELIEVING IT WAS MANDATORY.

The trial court erred when it failed to recognize and exercise its discretion to decline the prosecution’s request that Turner be ordered to pay \$200 for “court costs.”

(i) Relevant Facts

The defendant has no income, no real property, and only \$500 in other property. CP 56-58. He has \$6,000.00 of undischarged debt. *Id.* As such, the trial court found him indigent for trial and appellate purposes. CP 55, 59.

At sentencing, the State asked the trial court to impose \$200 for “court costs.” 2RP 5. The prosecutor never specified what court cost this applied to. 2RP 5. The State also asked that a discretionary LFO covering

witness costs be imposed. 2RP 5. Due to appellant's inability to pay, defense counsel asked only that mandatory fees be imposed, but mistakenly included "court costs" as a mandatory fee. 2RP 10-11. Based on Turner's indigence, the trial court declined to impose witness costs. 2RP at 17. However, it ordered all other LFOs it believed were mandatory. 2RP 17.

(ii) Legal Argument

When sentencing a criminal defendant, the trial court may exercise its discretion and order discretionary LFOs only if it finds the defendant has the ability or likely future ability to pay. RCW 10.01.160. Here, the trial court erred when it failure to recognize and exercise its discretion regarding the "court costs" fee. See, State v. Grayson, 154 Wn.2d 333, 335-36 111 P.3d 1183 (2005) (failure to exercise is discretion is an abuse of discretion); State v. Flieger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) (same).

"Court costs" are predominantly discretionary fees and include such things as witness costs, sheriff service fees, jury demand fees, extraditions costs, and criminal filing fees. CP 42. The only "court cost" that has been recognized as mandatory is the criminal filing fee, while all others are discretionary. E.g., State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755, 758 (2013). As such, a generic "court cost" order cannot be construed as a mandatory fee. Hence, the trial court had discretion to deny

the State's request that it impose this fee upon Turner. It erred in not recognizing and exercising its discretion.

In response, the State may claim that the trial court most likely meant the court cost to mean a criminal filing fee. This argument should be rejected on two grounds. First there is no record to support such speculation. 2RP 1-18. Second, a close reading of the statute authorizing the imposition of the criminal filing fee demonstrates that this is not a mandatory fee.⁸

The language of RCW 36.18.020(2)(h) is markedly different than that in other statutes authorizing mandatory fees. The Victim's Penalty Assessment (VPA) is recognized as a mandatory fee, with its authorizing statute providing: "When any person is found guilty in any superior court of having committed a crime...there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035. The statute is unambiguous in its command that such a fee shall be imposed. Likewise, the statute authorizing the DNA-collection fee is also unambiguous in its mandatory nature, stating: "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." RCW 43.43.7541.

⁸ Lundy provides no rationale and no analysis of the statutory language supporting its conclusion that the fee is mandatory.

In contrast, RCW 36.18.020(2)(h) does not contain directives that set forth a mandatory fee, providing only that: “Upon conviction ... an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.” Emphasis added. Despite the fact that the statute uses the word “shall” which is often indicative of a mandatory fee, it also uses the term “be liable,” which is not consistent with an unambiguously mandatory obligation.

Blacks Law Dictionary recognizes the term “liable” encompasses a broad range of possibilities – from making a person “obligated” in law to imposing on a person a “future possible or probable happening that may not occur.” Blacks Law Dictionary 915 (6th ed.1990). As such, the filing fee statute simply states that the trial court shall impose a possible future fee that may not occur. Thus, at best, the statutory language in RCW 36.18.020(2)(h) is ambiguous as to its mandatory or discretionary nature.

As shown in the DNA and VPA statutes, the Legislature clearly knows how to authorize an unambiguous and mandatory fee. It did not do so with the criminal filing fee statute. Under the rule of lenity, the statute must be interpreted in appellant’s favor. State v. Jacobs, 154 Wn. 2d 596, 601, 115 P.3d 281, 283 (2005). Hence, this Court should decline to follow

Lundy and, instead, conclude the criminal filing fee is a discretionary LFO.⁹

Here, the trial court did not recognize it had discretion to decline the State's proposed court costs fee. Hence, it cannot be said the trial court reasonably exercised its discretion when it imposed the court costs fee. Indeed, the record shows that the trial court would not have imposed that fee if it had known of its discretion. RP 349. This Court, therefore, should vacate the court costs fee.

V. TURNER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL MISINFORMED THE TRIAL COURT THAT "COURT COSTS" ARE MANDATORY LFOs.

To the extent this Court concludes that the trial court's erroneous finding that "court costs" were a mandatory LFO was a result of the misinformation provided by defense counsel, reversal of that order is still required due to ineffective assistance of counsel.

As discussed in detail above, ineffective assistance of counsel is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26 (adopting two-prong test from Strickland).

Both prongs are satisfied here.

⁹ If this Court holds that the "court costs" ordered here are mandatory LFOs, appellant extends his substantive due process challenge outlined above to include this fee.

As explained above, a generic order for “court costs” is not a mandatory LFO. It was objectively unreasonable for defense counsel to instruct the court otherwise. Furthermore, prejudice is established under this record. Because of Turner’s indigent status, the trial court exercised its discretion to waive the witness cost fee. Due to Turner’s indigent status, it intended to impose only those LFOs that were mandatory. Had defense counsel properly informed the court a generic “court costs” fee was discretionary and not misled the court into believing it was mandatory, it is reasonably probable the court would not have imposed the fee. As such, Turner received ineffective assistance of counsel and this Court should reverse and remand for the trial court to correct the LFO order by striking that fee.

VI. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Turner was represented below by appointed counsel. As stated above, the trial court found him indigent for purposes of this appeal. Under RAP 15.2(f), “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.”

Under RCW 10.73.160(1), appellate courts “*may* require an adult offender convicted of an offense to pay appellate costs.” (Emphasis added). The commissioner or clerk “will” award costs to the State if the State is the substantially prevailing party on review, “*unless the appellate court directs otherwise in its decision terminating review.*” RAP 14.2 (emphasis added). Thus, this Court has discretion to direct that costs not be awarded to the state. State v. Sinclair, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 393719, 4*.¹⁰ Our Supreme Court has rejected the notion that discretion should be exercised only in “compelling circumstances.” State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. Sinclair, WL 393719, *5. Moreover, ability to pay is an important factor that may be considered. Id.

Based on Turner’s indigence, this Court should exercise its discretion and deny any requests for costs in the event the State is the substantially prevailing party.

¹⁰ Only the Westlaw citation is currently available.

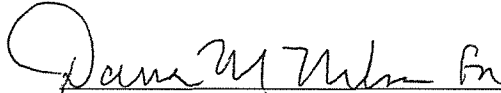
D. CONCLUSION

For reasons stated above, this Court should reverse Turner's conviction due to prosecutorial misconduct and ineffective assistance of counsel. Additionally, this Court should find that the statutes authorizing mandatory LFOs violated substantive due process as applied in this case and should reverse the order. Alternatively, it should find the trial court erred in imposing the generic "court costs" fee and reverse that order.

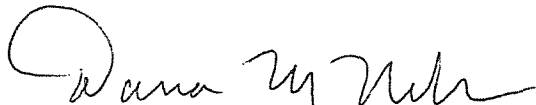
Dated this 16th day of March, 2016

Respectfully submitted

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 48095-6-II
)	
KENNETH TURNER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16TH DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KENNETH TURNER
DOC NO. 848192
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF MARCH 2016.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

March 16, 2016 - 2:27 PM

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