No. 44744-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Geoffrey Lawson,

Appellant.

Kitsap County Superior Court Cause No. 12-1-00713-4

The Honorable Judge Steven Dixon

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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38. The trial court erred by adopting Finding of Fact No. 8. CP 467.

    ISSUE 6: A criminal conviction may not be based on propensity evidence. In this case, the jury heard evidence that Mr. Lawson had committed prior acts of burglary and voyeurism. Did Mr. Lawson's conviction violate his Fourteenth Amendment right to due process because it was based in part on propensity evidence?

    ISSUE 7: ER 403 and ER 404(b) prohibit introduction of evidence of prior misconduct, except in limited circumstances. Here, the court allowed the prosecution to admit evidence that Mr. Lawson had committed prior acts of burglary and voyeurism. Did the trial court err by admitting evidence of prior misconduct?

39. Mr. Lawson was denied his state constitutional right to a unanimous verdict on count four.

40. The trial court erred by instructing jurors on alternative means of committing voyeurism.

41. The trial court erred by entering a judgment of conviction in count four based on the jury's general verdict, where the evidence was insufficient to support one alternative means of committing voyeurism.

    ISSUE 8: An accused person has a constitutional right to a unanimous verdict, including unanimity as to the means by which the crime was committed. Here, the evidence was insufficient to establish one of the alternative means of committing voyeurism in

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42. Mr. Lawson was denied his state constitutional right to a unanimous verdict on counts one, three, and five.

43. The trial court erred by instructing jurors on alternative means of committing burglary, as charged in counts one, three, and five.

44. The trial court erred by entering a judgment of conviction in counts one, three, and five based on the jury's general verdict, where the evidence was insufficient to support one alternative means of committing burglary.

45. The trial court erred by failing to give a unanimity instruction as to count one, where the state presented evidence of multiple acts.

ISSUE 9: Where the jury is instructed on alternative means of committing an offense, reversal is required unless substantial evidence supports each alternative means. Here, jurors were instructed on two alternative means of committing burglary; however, the evidence supported only one alternative. Did Mr. Lawson's burglary conviction in counts one, three, and five violate his right to a unanimous verdict under Wash. Const. art. I, § 21?

ISSUE 10: Where the prosecution presents evidence of multiple acts to support a single charge, the state must either elect one act or the court must provide a unanimity instruction as to that charge. Here, the prosecutor introduced evidence that Mr. Lawson entered the hospital building through a loading dock, and that he later entered the women's restroom. Did the trial court's failure to provide a unanimity instruction as to count one violate Mr. Lawson's right to a unanimous verdict under Wash. Const. art. I, § 21?

46. The trial court failed to properly determine Mr. Lawson's criminal history and offender score.

47. The trial court erred by including a 2008 conviction for voyeurism in Mr. Lawson's criminal history.

48. The trial court erred by including a 2003 conviction for "Assault 4 – Sexual Motivation" in Mr. Lawson's criminal history.

49. The trial court erred by sentencing Mr. Lawson with an offender score of 16.

50. The trial court erred by adopting Finding of Fact No. 2.2 (Judgment and Sentence)

51. The trial court erred by adopting Finding of Fact No. 2.3 (Judgment and Sentence).

    ISSUE 11: At sentencing, the prosecution must prove criminal history by a preponderance of the evidence. Here, the prosecutor failed to introduce evidence establishing a 2008 conviction for voyeurism or a 2003 conviction for simple assault with sexual motivation. Did the trial court violate Mr. Lawson's Fourteenth Amendment right to due process by sentencing him with an offender score of 16?

52. The trial court erred by imposing attorney fees in the amount of $1135.

53. The trial court exceeded its authority by imposing attorney fees, because Mr. Lawson represented himself at trial.

    ISSUE 12: A trial court may only impose costs and fees authorized by statute. Here, the court imposed attorney fees despite the lack of statutory authority for such an order. Did the trial court exceed its statutory authority by requiring Mr. Lawson to pay the cost of counsel, especially given that he represented himself at trial?

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55. The court erred by finding that Mr. Lawson has the present or future ability to pay his legal financial obligations.

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56. The trial court erred by ordering Mr. Lawson to pay a $100 domestic violence assessment.

57. The trial court erred by ordering Mr. Lawson to pay a $100 expert witness fund contribution.

58. The trial court erred by assessing a $100 crime lab fee.

Issue 14: A sentencing court may not impose costs or fees that are not authorized by statute. Here, the court imposed $100 in fees not authorized by any statute, and $200 in fees inapplicable to Mr. Lawson's case. Did the sentencing court exceed its statutory authority by erroneously imposing $300 in fees?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Geoffrey Lawson faced seven charges stemming from three incidents where he used the women's public restrooms. CP 1-9.

The first two charges related to his presence in a public women's bathroom at Harrison Hospital. RP (1/4/13) 85. Count one charged burglary in the second degree:

> On or about May 17, 2012, in the County of Kitsap, State of Washington, the above-named Defendant, with intent to commit a crime against a person or property therein, entered or remained unlawfully in a building, contrary to the Revised Code of Washington 9A.52.030(1).
> CP 1.

Count two charged attempted voyeurism. CP 2-3. The substantive portion of that charge read:

> On or about May 17, 2012, in the County of Kitsap, State of Washington, the above-named Defendant, for the purpose of arousing or gratifying the sexual desire of any person, did knowingly view, photograph, or film (a) another person without that person's knowledge and consent while the person was in a place where he or she would have a reasonable expectation of privacy; and/or (b) the intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place; contrary to the Revised Code of Washington 9A.44.115(2) and Laws of 2003, Chapter 213.
> CP 2.

Counts three and four related to Mr. Lawson's presence in the public women's bathroom at a Barnes and Noble store. RP (1/4/13) 86.

Count three charged another burglary. The charge used the same language used to charge count one; only the date was changed. CP 3-4. Count four charged voyeurism. The operative language read the same as for the other voyeurism charge. CP 4-5.

Three counts related to a second incident at the Harrison Hospital. RP (1/4/13) 86. Count five charged burglary in the first degree, and read:

> On or about June 19, 2012, in the County of Kitsap, State of Washington, the above-named Defendant, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in a building and in entering or while in the building or in immediate flight therefrom, the Defendant or another participant in the crime was armed with a deadly weapon and/or did assault any person therein, to wit: Charles Leslie Nace, contrary to the Revised Code of Washington 9A.52.020.
> CP 5.

Count six charged second-degree assault.[1] CP 6. Count seven charged attempted voyeurism. CP 7. The operative language charging these counts read the same as the language charging the other burglary and voyeurism charges, except with regard to the date (and the additional element required to prove first-degree burglary). CP 1-7.

Counts one, three and five (the burglary counts) carried special allegations of sexual motivation and rapid recidivism. CP 2-4. Counts

[1] Ms. Lawson was acquitted of assault two. CP 11.

three and five also carried two additional aggravators: victim present during burglary, and invasion of privacy. CP 4.

Mr. Lawson requested a bill of particulars specifying the underlying facts alleged for each charge. CP 319-325; RP (12/21/12) 12; RP (12/28/12) 6-7; RP (1/4/13) 83-84. At a hearing on the motion, the prosecutor indicated that the state would rely on a continuing course of conduct to prove each voyeurism charge. RP (1/4/13) 84. After questioning from the court, the prosecutor clarified that counts one and five involved the Harrison Hospital, and count three involved the Barnes and Noble. RP (1/4/13) 85-86. The court denied Mr. Lawson's motion. RP (1/4/13) 86.

Prior to trial, Mr. Lawson moved to dismiss the burglary charges, arguing that he was in areas open to the public. RP (1/11/13) 8; CP 198-206, 325-427, 460-463. At a hearing on the issue, he urged the court to find the element of unlawful entry or remaining not met. The trial judge responded: "The burglary statute says if you 'unlawfully enter' or 'unlawfully remain.' If you enter a building lawfully and you commit a crime therein, you are unlawfully remaining. So your motion to dismiss on that basis is denied." RP (1/11/13) 10-11.

Mr. Lawson also moved to dismiss the voyeurism charged in count four, arguing insufficient evidence. The court denied this motion as well. RP (11/2/12) 3-7; CP 198-206, 220.

Prior to trial, Mr. Lawson sought the appointment of new counsel. RP (11/14/12) 10. When his request was denied, the court allowed him to represent himself. RP (11/15/12) 74-76. After hearing from the judge, experiencing the difficulties of self-representation, and further contemplating the issue, he requested an attorney be appointed. RP (11/14/12) 46, 53-55; RP (11/15/12) 75, 80-81; RP (12/21/12) 8-9; RP (1/11/13) 11-12; RP (1/14/13) 6. The court denied the request summarily, telling Mr. Lawson that his decision was "irrevocable". RP (1/14/13) 6, 34.

At trial, the state offered ER 404(b) evidence relating to four prior incidents. RP (10/8/12) 2-32. Over defense objection, the court allowed the state to present the evidence. The jury was told about four separate episodes where Mr. Lawson was found in a public women's bathroom. RP (1/14/13) 105-127, 142-144; RP (1/16/13) 162-166, 174-191, 202-213, 217-245, 253-260.

Regarding the Barnes and Noble charges, the state presented testimony from Amy Starkey. She testified that she was in the women's bathroom, went into the bathroom stall, urinated, came out and washed her

hands. RP (1/17/13) 271-275. While in the main area of the bathroom, near the sink, she saw Mr. Lawson. She did not see him any other time. RP (1/17/13) 272, 274. She did not testify that she saw Mr. Lawson while she was in the stall. She did not testify that she saw him use a mirror or any other device to spy on her. Nor did she testify that the stalls permitted a person to peek from one stall into the other. RP (1/17/13) 271-275.

The state also presented evidence regarding the first incident at Harrison Hospital. In a security video, Mr. Lawson is seen entering the hospital through a loading dock door. The door is not marked in any way. RP (1/17/13) 291, 306, 318. Security staff later learned that a man was in the women's bathroom. RP (1/17/13) 289, 344. The state did not present testimony of anyone who had used the restroom while Mr. Lawson was inside.

The state also presented evidence regarding a second incident at Harrison Hospital. In the second incident, Mr. Lawson was arrested by security staff in a hallway outside the bathrooms.[2] RP (1/17/13) 346-347, 357.

After the prosecution rested, Mr. Lawson moved to dismiss all of the charges. He argued that the evidence was insufficient to prove

[2] This arrest resulted in the charge of assault in the second degree. The jury acquitted Mr. Lawson of that charge. CP 11.

voyeurism regarding the Barnes and Noble incident. He also argued that restrooms are public places, and thus he did not enter or remain unlawfully. RP (1/23/13) 466-468. The court denied his motions. RP (1/23/13) 468.

At the conclusion of the evidence, Mr. Lawson asked the court to provide a unanimity instruction regarding the burglary charges. He reminded the parties that he'd sought a bill of particulars to determine if the state was proceeding under an unlawful entry theory or one of unlawful remaining. RP (1/24/13) 535; CP 493-503. The prosecutor responded that the state was proceeding under both theories. RP (1/24/13) 536. Then Mr. Lawson asked: "So it's the women's restroom and not the building itself?" RP (1/24/13) 536. The prosecutor responded: "Come on. You've sat through the whole trial." RP (1/24/13) 536. The judge then told the parties that the state's theory focused on the entry into the women's restroom, not the building. The court denied Mr. Lawson's request. RP (1/24/13) 536. The court did not give a unanimity instruction. CP 504-550.

In closing, the prosecutor argued that Mr. Lawson was guilty of unlawful entry and unlawful remaining in each of the burglary charges. RP (1/25/13) 552-570. Regarding count one, the state mentioned Mr.

Lawson's entry through the loading dock door, and also referred jurors to his entry into the women's restroom. RP (1/24/13) 536, 556-560.

The jury convicted Mr. Lawson of the burglary, voyeurism, and attempted voyeurism charges. It acquitted him of assault. RP (1/25/13) 595-599. The court held a separate trial regarding the rapid recidivism aggravator. The jury answered "yes" on a special verdict form. RP (1/25/13) 603-618, 621-625.

Mr. Lawson renewed all of his arguments for dismissal. The court summarily denied his motions. RP (1/25/13) 625-626. He renewed them again at sentencing, with the same result. RP (2/15/13) 2-6; CP 563-648, 651-705, 809-810.

At sentencing, Mr. Lawson objected to and disputed "every aspect of the presentencing report." RP (3/15/13) 6. The prosecution did not present any witnesses or documentary evidence at sentencing. RP (3/15/13) 3-12; CP 720-808. The court found that Mr. Lawson had two prior voyeurism convictions, one prior conviction for attempted voyeurism, and one prior conviction for a misdemeanor assault with sexual motivation. CP 11. The trial judge stated that he had based his findings on evidence admitted at trial, and not on the presentence investigation report. RP (3/15/13) 12; Trial Exhibit List, Supp. CP. The court found that Mr. Lawson had an offender score of 16, and sentenced

him to life in prison, with the possibility of parole after 176 months. RP (3/15/13) 10-12.

The court imposed attorney's fees in the amount of $1135. CP 16. The judge also ordered Mr. Lawson to pay a $100 domestic violence assessment, a $100 expert witness fund contribution, and a $100 crime lab fee. CP 16.

Mr. Lawson timely appealed. CP 24.

ARGUMENT

I. MR. LAWSON'S CONVICTIONS WERE ENTERED IN VIOLATION OF HIS RIGHT TO NOTICE UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND UNDER WASH. CONST. ART. I, §§ 3 AND 22.

A. Standard of Review.

Constitutional questions are reviewed *de novo*. *McDevitt v. Harbor View Med. Ctr.*, 85367-3, 2013 WL 6022156 (Wash. Nov. 14, 2013). A challenge to the constitutional sufficiency of a charging document may be raised for the first time on appeal.[3] *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document

[3] Such a challenge raises a manifest error affecting a constitutional right. RAP 2.5(a)(3).

liberally. *Id, at* 105. The test is whether or not the "necessary *facts*" appear or can be found by fair construction in the charging document. *Id, at* 104-106 (emphasis added). If the Information is deficient, prejudice is presumed and reversal is required. *State v. Courneya*, 132 Wn. App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

B. Mr. Lawson was constitutionally entitled to notice that was factually adequate.

A person accused of a crime has the right to complete notice of the charge. U.S. Const. Amends. V, VI, XIV; Wash. Const. art. I, §§ 3, 22. *Kjorsvik,* 117 Wn.2d at 100. Courts zealously guard this right. *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

A constitutionally sufficient charging document must notify the accused person of the essential elements of the offense and of the underlying facts alleged. The rule

> requires that a charging document *allege facts supporting every element of the offense,* in addition to adequately identifying the crime charged. This is not the same as a requirement to 'state every *statutory element* of' the crime charged.

State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) (emphasis in original). When a person is charged by Information, the charging document must include a statement of the essential facts in addition to a statement of the essential elements:

> Defining the crime with more specificity in a complaint assists a defendant in determining the particular incident to which the complaint refers… [Where a citation is issued at the scene, the defendant] presumably know[s] the *facts* underlying [the] charges.

Id, at 699.

An Information must provide notice of both the elements and the facts. It must include "(1) the description (*elements*) of the crime charged; and (2) a description of the specific *conduct* of the defendant which allegedly constituted that crime." *Auburn v. Brooke*, 119 Wn.2d 623, 629-630, 836 P.2d 212 (1992) (emphasis in original). This is not true of a citation, which need only recite the essential elements. *Id.*

The accused person must be "apprised of the elements of the crime charged *and the conduct of the defendant which is alleged to have constituted that crime*." *Kjorsvik,* 117 Wn.2d at 98. (emphasis added). An Information must allege "sufficient *facts* to support every element of the crime charged." *Leach,* 113 Wn.2d at 688 (emphasis in original).

C. The Information was factually deficient because it did not include specific facts supporting each element of each offense.

A person is guilty of burglary if s/he enters or remains unlawfully in a building with intent to commit a crime. RCW 9A.52.020; RCW 9A.52.030. First-degree burglary requires proof that the person was armed with a deadly weapon or assaulted another (while in the building or in immediate flight therefrom). RCW 9A.52.020.

Voyeurism may be committed by two alternative means:

> A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films:
>
> > (a) Another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or
> > (b) The intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.

RCW 9A.44.115.

In this case, the Information did not allege specific facts supporting each element of the charges.[4] CP 2-7. Instead, the charging document parroted the language of each statute.[5] It did not specifically outline the actions Mr. Lawson took, the location of each offense, or the names of any alleged victims. It did not identify the substantial step Mr. Lawson was alleged to have taken toward committing voyeurism in counts two and seven. CP 2-7. Mr. Lawson requested a bill of particulars, but the court declined to order the state to provide one. RP (1/4/13) 86.

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[4] The Information included only two facts: the date of each alleged crime and the county in which it allegedly took place. CP 1-8.

[5] If this case involved charges initiated by citation, the bare list of essential elements would likely have been sufficient to charge each crime. *Brooke,* 119 Wn.2d at 629-630. However, because Mr. Lawson was charged by Information, the state was required to allege *facts*, not merely elements. *Id.*

The charging document was factually deficient. It did not provide "a description of the specific *conduct* of the defendant which allegedly constituted [the] crime." *Brooke,* 119 Wn.2d at 629-630 (emphasis in original). Nor can the underlying facts be inferred from the charging language. Accordingly, Mr. Lawson need not demonstrate prejudice. *Courneya*, 132 Wn. App. at 351 n. 2; *McCarty*, 140 Wn.2d at 425. His convictions for burglary, voyeurism, and attempted voyeurism must be reversed. *McCarty*, 140 Wn.2d at 425. The case must be dismissed without prejudice. *Id.*

II. THE TRIAL COURT SHOULD HAVE GRANTED MR. LAWSON'S MOTION FOR A BILL OF PARTICULARS.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *McDevitt*, 85367-3, 2013 WL 6022156 (Wash. Nov. 14, 2013). Ordinarily, denial of a request for a bill of particulars is reviewed for an abuse of discretion. *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 462, 303 P.2d 290 (1956). However, any decision alleged to infringe a constitutional right must be reviewed *de novo*. *See, e.g., State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768

(2009);[6] *see also United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir. 1992).

B. Mr. Lawson was entitled to a bill of particulars.

An accused person has the right "to demand the nature and cause of the accusation against him." art. I, § 22. Under this provision, "[e]very material element of the charge, along with all essential supporting facts, must be put forth with clarity." *McCarty*, 140 Wn.2d at 425 (citing, *inter alia,* CrR 2.1(a)(1)).

An Information must include "a plain, concise and definite written statement of the essential facts constituting the offense charged." CrR 2.1(a)(1). There is no presumption in favor of an Information. *Hogan*, 49 Wn.2d at 463. A factually deficient Information can be cured by a bill of particulars:

> Even where the information charges a crime in the language of a statute, it may be so vague as to particulars as to render it subject to a motion for a more definite statement... If so, the defendant is entitled to a bill of particulars.

State v. Maurer, 34 Wn. App. 573, 577-578, 663 P.2d 152 (1983) (citations omitted). A bill of particulars is not merely "an informal means of assisting a defendant in framing a defense," with "no formal

[6] In *Iniguez,* the court reviewed *de novo* a trial court's decision granting a continuance, because the decision impacted the defendant's speedy trial right. *Id., at* 280-281.

significance." *Id.,* at 577. Instead, "a bill of particulars is an integral part of the State's pleadings by which the trial court—" and thus the defendant "can determine, before trial, all the State expects to prove." *Id.,* at 578.

Here, the Information was vague. CP 1-8. Although it outlined the essential legal elements of each offense, it included only two facts: the date of each offense and the county in which the prosecution alleged it took place. CP 1-8. Mr. Lawson filed a request for a bill of particulars.[7] His motion outlined the reasons he needed clarification on each of the crimes charged. CP 319-325.

The vagueness of the Information denied Mr. Lawson his constitutional right to notice of the charges against him. The trial court's refusal to grant his motion for a bill of particulars infringed his right "to demand the nature and cause of the accusation against him." art. I, § 22. His convictions must be reversed. The case must be remanded with instructions to grant Mr. Lawson's motion for a bill of particulars. *Maurer*, 34 Wn. App. at 577-578.

[7] Although Mr. Lawson made his request more than 10 days after arraignment, the court may permit a motion at a later time. CrR 2.1(c). The trial court did not find Mr. Lawson's motion untimely. RP (1/4/13) 84-89.

III. THE STATE FAILED TO INTRODUCE SUFFICIENT EVIDENCE TO PROVE BURGLARY (COUNTS ONE, THREE, AND FIVE), OR TO PROVE VOYEURISM (COUNT FOUR).

A. Standard of Review.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Budik*, 173 Wn.2d 727, 733, 272 P.3d 816 (2012). A conviction based on insufficient evidence must be reversed and the charge dismissed with prejudice. *Id.*

B. The voyeurism conviction in count four was based on insufficient evidence because no rational jury could have found beyond a reasonable doubt that Mr. Lawson viewed another person in a place where she had a reasonable expectation of privacy, or that he viewed another person's intimate areas.

Voyeurism may be committed by either of two alternative means. First, a person commits voyeurism by viewing another person who is in a place where she would have a reasonable expectation of privacy. RCW 9A.44.115(2)(a).

In count four, the state did not produce sufficient evidence of this first alternative. The prosecution's evidence showed only that Mr. Lawson viewed Amy Starkey when she stood by the sink in the restroom. RP (1/17/13) 271-278. Nothing in the record suggested that the sink was a private area. Nor was there evidence that Mr. Lawson viewed Starkey

while she was in the toilet stall. Nor did the state introduce any evidence that Mr. Lawson possessed or used a mirror that would have allowed him to do so. Nor was there any indication that he stood on the toilet to look over the stall, or that he was able to see her through an opening in the stall. RP (1/17/13) 271-278. Accordingly, the evidence was insufficient to prove that he viewed Starkey in a place where she had a reasonable expectation of privacy.

Second, a person commits voyeurism by viewing the intimate areas of another person under circumstances where the person has a reasonable expectation of privacy. RCW 9A.44.115(2)(b). The state did not introduce any evidence suggesting that Mr. Lawson ever viewed Starkey's intimate areas. RP (1/17/13) 271-278. Accordingly, the evidence was insufficient under the second alternative as well.

The state presented insufficient evidence to convict Mr. Lawson of voyeurism in count four. His conviction must be reversed. *Budik*, 173 Wn.2d at 733. The case must be dismissed with prejudice. *Id.*

C. The evidence was insufficient to prove burglary because no rational jury could have found beyond a reasonable doubt that Mr. Lawson intended to commit a crime "against persons or property" when he entered or remained in the women's public restroom.

To obtain a conviction for burglary, the prosecution was required to prove that Mr. Lawson entered or remained unlawfully in a building

"with intent to commit a crime against persons or property therein." RCW 9A.52.020; CP 517. Conviction "requires more than just a simple showing of an intent to commit a crime." *State v. Devitt*, 152 Wn. App. 907, 912, 218 P.3d 647 (2009). Instead, the crime intended by the accused person must be a crime against persons or property. *Id.* The determination of whether or not a particular crime qualifies as a crime against persons or property is a legal question. *Id, at* 911-912.

In *Devitt,* the defendant entered an apartment through an unlocked door while fleeing from the police. He was convicted of burglary on the theory that he unlawfully entered with intent to obstruct the police. The Court of Appeals reversed for insufficient evidence, holding that obstructing is not a crime against persons or property.[8] *Id, at* 911-913. Part of the basis for this conclusion was the absence of obstructing from the list of crimes against persons or property in RCW 9.94A.411. *Id.*

That statute does not list voyeurism as a crime against persons. RCW 9.94A.411. Accordingly, intent to commit voyeurism cannot provide the basis for a burglary charge. *Devitt*, 152 Wn. App. at 911-913. Mr. Lawson's burglary convictions must be reversed. The charges must be dismissed with prejudice. *Budik*, 173 Wn.2d at 733.

[8] In addition, the "victims" were the police officers who were not within the apartment. *Devitt,* 152 Wn. App. at 913.

D. The evidence was insufficient to prove first-degree burglary (count five), because Mr. Lawson did not commit assault "in entering or while in the building or in immediate flight therefrom," where the "building" at issue was the women's public restroom.

First-degree burglary requires proof that the accused person assaulted another "in entering or while in the building or in immediate flight therefrom." RCW 9A.52.020. In this case, the prosecution explicitly alleged that Mr. Lawson unlawfully entered the women's restroom. RP (1/24/13) 535-537, 555-556, 559, 582. The restroom was therefore the "building" he was charged with unlawfully entering. *See, e.g,. State v. Miller*, 91 Wn. App. 869, 873, 960 P.2d 464 (1998) (storage locker located in common area of multiple unit apartment complex qualifies as a "building.")

Mr. Lawson did not assault anyone within the restroom. He left the restroom, and was accosted by Nace elsewhere in the building. He was not "in immediate flight" from the restroom: no one testified that he appeared to be fleeing the scene. Instead, Nace came upon him walking through the hall of the hospital. RP (1/17/13) 345-350.

The evidence was insufficient to convict Mr. Lawson of first-degree burglary. His conviction must be reversed and the charge dismissed with prejudice. *Budik*, 173 Wn.2d at 733.

IV. MR. LAWSON WAS DENIED HIS STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *McDevitt*, 85367-3, 2013 WL 6022156 (Wash. Nov. 14, 2013). A trial court's failure to provide a unanimity instruction is a manifest error affecting the constitutional right to jury unanimity. *State v. Moultrie*, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3). Such errors can be raised for the first time on appeal. *Moultrie,* 143 Wn. App. at 392; *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997).[9]

B. The burglary conviction in count one infringed Mr. Lawson's right to a unanimous verdict because the state relied on evidence of multiple acts to prove the offense and the court did not give a unanimity instruction.

An accused person has a state constitutional right to a unanimous jury verdict.[10] art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a defendant can be convicted, jurors must

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

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

unanimously agree that he or she committed the charged criminal act. *State v. Coleman,* 159 Wn.2d 509, 511, 150 P.3d 1126 (2007).

Where the prosecution introduces evidence of more than one act to support a single charge, the state must elect one act for conviction. If it does not, the court must provide a unanimity instruction as to that charge. *Id.* This requirement "protect[s] a criminal defendant's right to a unanimous verdict based on an act proved beyond a reasonable doubt." *Id.* Failure to provide a unanimity instruction violates the state constitutional right to a unanimous jury. art I, §§ 21 and 22; *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

The burglary conviction in count one violated Mr. Lawson's right to jury unanimity. The prosecution introduced evidence of two similar acts. First, the state introduced evidence that Mr. Lawson entered the hospital through the loading dock area. RP (1/17/13) 289-291. The public was not expected to use this entrance. RP (1/17/13) 291. Second, the state introduced evidence that he entered the women's restroom, and that he was not permitted to be there. RP (1/17/13) 289-290, 296. The state mentioned both of these acts in closing. It did not elect one. RP (1/24/13) 536, 556-560. Nor did the court provide a unanimity instruction. CP 504-544.

Some jurors may have voted to convict Mr. Lawson based on his entry through the loading dock door. Others may have found that he entered or remained unlawfully when he went inside the women's restroom. Given the state's failure to elect one act, the state should given a unanimity instruction. *Kitchen,* 110 Wn.2d at 409.

The failure to provide a unanimity instruction infringed Mr. Lawson's right to a unanimous verdict.[11] art. I, § 22; *Kitchen*, 110 Wn.2d at 409; *State v. Lobe*, 140 Wn. App. 897, 903-905, 167 P.3d 627 (2007). His burglary conviction in count one must be reversed, and the case remanded for a new trial. *Kitchen,* 110 Wn.2d at 409.

C. The burglary convictions and the voyeurism conviction in count four infringed Mr. Lawson's right to a unanimous verdict because the court instructed on alternative means that were not supported by the evidence.

The right to a unanimous verdict includes the right to consensus on the means by which the defendant committed the crime. *Lobe*, 140 Wn. App. at 903-905. A particularized expression of unanimity (in the form of a special verdict) is required unless there is sufficient evidence to support each alternative means submitted to the jury. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994).

[11] This manifest error affecting Mr. Lawson's constitutional right to a unanimous verdict may be raised for the first time on appeal. *Kiser*, 87 Wn. App. at 129; RAP 2.5(a)(3).

If one or more alternatives are not supported by sufficient evidence, the conviction must be reversed. *Lobe,* 140 Wn. App. 897. Evidence is sufficient if, when viewed in the light most favorable to the state, a rational trier of fact could find the essential elements beyond a reasonable doubt. *State v. Engel,* 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

1. The evidence was not sufficient to prove that Mr. Lawson entered unlawfully.

Burglary is an alternative means crime. *State v. Allen*, 127 Wn. App. 125, 131, 110 P.3d 849 (2005). A person may be convicted of burglary based on unlawful entry or on unlawful remaining. *Id.* The court instructed jurors on both alternative means. CP 517-518, 524-525, 530-531.

The evidence was insufficient to prove that Mr. Lawson unlawfully entered the building with intent to commit a crime. As to count one, the state presented some testimony that the public was not expected to use the loading dock area. However, the prosecution did not prove that the public was actually barred from the area. RP (1/17/13) 291, 306, 318. The record does not establish that any signs prohibited entry through the loading dock. RP (1/17/13) 306. Accordingly, the state did not prove that Mr. Lawson entered the building unlawfully.

The evidence did not even suggest unlawful entry in counts three and five. Despite this, it is possible that jurors relied on Mr. Lawson's entry into the women's restroom as an unlawful entry (in all three counts charging burglary). In fact, the evidence showing he went into the women's restroom is more properly analyzed as unlawful remaining. His license or privilege to remain in the building (as a member of the public) was expressly or impliedly limited by the restriction against male members of the public entering the women's restroom. By going into the restroom, he violated this limit, and thus "remained unlawfully" in the building. CP 517, 524, 530.

The court should not have instructed jurors on both alternative means of committing burglary. The unlawful entry alternative was not supported by substantial evidence. Accordingly, Mr. Lawson's right to a unanimous verdict was violated.[12] *Lobe*, 140 Wn. App. at 903-905. His burglary convictions must be reversed and the charges remanded for a new trial. *Id.* On retrial, the prosecution may not pursue a theory based on unlawful entry. *Budik*, 173 Wn.2d at 733.

2. The evidence was not sufficient to prove that Mr. Lawson viewed Starkey's "intimate areas."

[12] The court's decision to instruct on both alternative means creates a manifest error affecting Mr. Lawson's right to a unanimous verdict. Accordingly, the error can be raised for the first time on appeal. *Kiser*, 87 Wn. App. at 129; RAP 2.5(a)(3).

Voyeurism is an alternative means offense. RCW 9A.44.115(2). A person commits voyeurism by (a) viewing another person who is in a place where she would have a reasonable expectation of privacy, or (b) viewing the intimate areas of another person, whether in a public or private place. RCW 9A.44.115(2). In this case, both alternative means were submitted to the jury. CP 522-524, 527-528, 536-537.

The state produced no evidence whatsoever from which jurors could conclude that Mr. Lawson viewed Starkey's "intimate areas." Jurors might conceivably have speculated that Mr. Lawson looked into Starkey's stall when she was using the toilet.[13] Conviction under the second alternative would have required additional speculation. The jury would have had to assume not only that he looked into the stall, but also that he watched her from an angle and at a time that allowed him to successfully view her "intimate areas." Even when taken in a light most favorable to the prosecution, there was insufficient evidence to prove that Mr. Lawson viewed Starkey's "intimate areas."

Because the court submitted both alternatives to the jury, Mr. Lawson was denied his constitutional right to a unanimous jury. *Lobe,* 140 Wn. App. 897. The voyeurism conviction in count four must be

[13] As noted elsewhere in this brief, there is no actual proof that he did so. Mr. Lawson argues the evidence was insufficient to convict him of the completed crime.

reversed. *Id.* If the charge is not dismissed for insufficient evidence, it must be remanded for a new trial. *Id.* On retrial, the state may not pursue a theory under the "intimate areas" means. *Budik*, 173 Wn.2d at 733.

V. THE TRIAL COURT MISINTERPRETED ER 404(B) AND VIOLATED MR. LAWSON'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY IMPROPERLY ADMITTING PROPENSITY EVIDENCE.

A. Standard of Review.

The interpretation of an evidentiary rule presents a question of law, reviewed *de novo*. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012). If the trial court interpreted the rule correctly, the appellate court ordinarily reviews for an abuse of discretion.[14] *Id.* However, an evidentiary ruling alleged to infringe a constitutional right must be reviewed *de novo*. *Iniguez*, 167 Wn.2d at 280-81; *Lankford*, 955 F.2d at 1548.

When the trial court denies a motion *in limine*, the moving party maintains a standing objection to the challenged evidence, which

[14] A trial court abuses its discretion when it makes a decision that is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). The improper admission of evidence requires reversal if there is a reasonable probability that it materially affected the outcome of the case. *State v. Fuller*, 169 Wn. App. 797, 831, 282 P.3d 126 (2012) *review denied,* 176 Wn.2d 1006, 297 P.3d 68 (2013) (Fuller I).

preserves the issue for appeal. *State v. McDaniel*, 155 Wn. App. 829, 853, 230 P.3d 245 (2010).

B. The court erred by permitting the state to introduce propensity evidence.

The use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment.[15] U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).[16] A conviction based in part on propensity evidence is not the result of a fair trial.[17] *Garceau,* 275 F.3d at 776, 777-778; *see also Old Chief v. United States*, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

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[15] The U.S. Supreme Court has expressly reserved ruling on a similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

[16] Washington courts are not bound by decisions of the federal circuit courts. *In re Crace*, 157 Wn. App. 81, 98 n. 7, 236 P.3d 914 (2010) *reversed on other grounds,* 174 Wn.2d 835, 280 P.3d 1102 (2012). However, decisions of the federal courts of appeal can provide guidance to Washington courts as they interpret the Fourteenth Amendment's due process clause.

[17] A violation of due process that has practical and identifiable consequences is a manifest error affecting the accused person's constitutional right. RAP 2.5(a)(3). It may therefore be raised for the first time on review.

In addition to constitutional limitations, the rules of evidence prohibit the introduction of propensity evidence.[18] Under ER 404(b),

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

ER 404(b) must be read in conjunction with ER 403, which requires that probative value be balanced against the danger of unfair prejudice.[19] *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

A trial court must begin with the presumption that evidence of prior bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied,* 176 Wn.2d 1015, 297 P.3d 708 (2013). The state bears a "substantial" of showing admission is appropriate for a purpose other than propensity. *State v. DeVincentis*, 150 Wn.2d 11, 19, 74 P.3d 119 (2003).

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[18] Evidentiary errors such as a misapplication of ER 403 and ER 404(b) are not themselves constitutional errors. *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986); *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The Washington Supreme Court has not been asked to decide whether or not a conviction based on propensity evidence violates the accused person's Fourteenth Amendment right to due process. Neither *Smith* nor *Jackson* considered whether a conviction based on propensity evidence violates due process.

[19] ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Fisher*, 165 Wn.2d at 745. Doubtful cases must be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson,* 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008).

Evidence that might rebut a defense should not be admitted unless the accused person actually raises such a defense. *State v. Ramirez*, 46 Wn. App. 223, 228, 730 P.2d 98 (1986). Defenses are "never a material issue unless first raised by the defendant." *Id.*

Here, the trial court misinterpreted ER 404(b), abused its discretion, and infringed Mr. Lawson's Fourteenth Amendment right to due process by allowing the state to introduce propensity evidence. Over Mr. Lawson's objection, the court allowed the state to introduce evidence of multiple prior incidents. RP (10/8/12) 26-32; CP 464-473. These prior incidents were highly prejudicial, and may well have eclipsed the evidence of the actual charges. One prior incident involved an allegation that Mr.

Lawson was touching himself.[20] RP (1/16/13) 165. Another involved allegations that he was peeping on young girls. RP (1/16/13) 218-232

The court did not condition its ruling on the issues raised by Mr. Lawson at trial:

> the State, having the burden of proof, *has the right to anticipate a defense* in such case of mistake or accident with respect to entering, and has the right to anticipate the defendant's assertion that whatever happened was not done for the purposes of sexual gratification.
> RP (10/8/12) 27 (emphasis added).

The court should not have allowed the state to preemptively introduce the prior incidents for these purposes. As in *Fisher,* the court should have conditioned admissibility on the defense actually raised by Mr. Lawson at trial. Here, Mr. Lawson did not try to persuade the jury he'd made a mistake and entered the wrong restroom. Nor did he testify that his entry was for some purpose unrelated to sexual gratification. *See* RP *generally;* RP (1/23/13) 524-526. Accordingly, the evidence should not have been admitted. *Ramirez,* 46 Wn. App. at 228.

The court should have taken the approach required under *Ramirez* and adopted by the lower court in *Fisher.* Even if the court believed the misconduct evidence admissible to rebut potential defenses, it should have

[20] The witness who made this allegation had not accused Mr. Lawson of doing so in prior statements. RP (1/16/13) 165.

conditioned its admission on Mr. Lawson actually raising those defenses at trial.

In addition, the trial court failed to properly weigh prejudice against probative value. The risk that jurors will improperly use evidence of prior bad acts as propensity evidence is great. This is especially true in cases involving sexual misconduct, "where the prejudice potential of prior acts is at its highest." *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982). Here, the trial judge mentioned the generic prejudice inherent in the admission of prior misconduct, but did not specifically weigh the particular evidence against its probative value, as required under the rule. RP (10/8/12) 26-32. The court's failure to do so requires reversal.

The court infringed Mr. Lawson's due process rights, misinterpreted ER 403 and ER 404(b), and abused its discretion by admitting propensity evidence. *Thang*, 145 Wn.2d at 642. Mr. Lawson's conviction must be reversed, and the case remanded for a new trial. *Id.*

VI. MR. LAWSON'S SENTENCE MUST BE VACATED BECAUSE THE SENTENCING COURT FAILED TO PROPERLY DETERMINE HIS OFFENDER SCORE AND STANDARD RANGE.

At sentencing, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist." RCW 9.94A.500(1). Under RCW 9.94A.525, the sentencing court is required to determine an offender score.

The offender score is calculated based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1). The burden is on the prosecution to establish criminal history by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012).

During the second phase of trial, the prosecution introduced evidence of a prior voyeurism conviction.[21] Ex. 55. It did not present evidence—either at trial or at sentencing—that Mr. Lawson had any other prior convictions. RP (3/15/13) 3-12.

Mr. Lawson did not admit or acknowledge a second voyeurism conviction or a fourth-degree assault with sexual motivation. Furthermore, he objected to and disputed "every aspect of the presentencing report." RP (3/15/13) 6.

Despite this, the court found Mr. Lawson had additional criminal history. This included a voyeurism conviction from 2008, and a misdemeanor assault with sexual motivation from 2003. CP 11.

Because the state failed to prove this prior history, the court's finding is not supported by the evidence. Findings 2.2 and 2.3 must be

[21] The exhibit also listed a prior conviction for attempted voyeurism. Ex. 55.

vacated and the case remanded for correction of Mr. Lawson's criminal history and offender score.

VII. THE COURT SHOULD NOT HAVE ORDERED MR. LAWSON TO PAY THE COST OF COURT-APPOINTED COUNSEL, THE $100 DOMESTIC VIOLENCE ASSESSMENT, THE $100 CONTRIBUTION TO THE EXPERT WITNESS FUND, AND THE $100 CRIME LAB FEE.

A. Standard of Review.

Reviewing courts assess questions of law and constitutional challenges *de novo*. *State v. Jones*, No. 41902-5-II, 2013 WL 2407119, --- P.3d --- (June 4, 2013); *State v. Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013). Illegally imposed costs and fees can be challenged for the first time on review. *State v. Calvin*, -- Wn.2d --, 302 P.3d 509, 521 n. 2 (Wash. Ct. App. 2013).

B. The trial court lacked statutory authority to order Mr. Lawson to pay the cost of court-appointed counsel, where Mr. Lawson represented himself at trial.

A court's authority to impose costs derives from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied,* 172 Wn.2d 1021, 268 P.3d 224 (2011).[22] The court may order an offender to pay "expenses specially incurred by the state in prosecuting

[22] *See also State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013) *review denied,* 177 Wn.2d 1021, 304 P.3d 115 (2013).

the defendant." RCW 10.01.160(2). The court may not order an offender to pay "expenses inherent in providing a constitutionally guaranteed jury trial." RCW 10.01.160(2).[23]

The order requiring Mr. Lawson to pay $1135 for court appointed attorney fees exceeded the trial court's authority. First, nothing in the statute specifically authorizes imposition of costs for counsel. Second, the costs of counsel were not "specially incurred by the state in prosecuting" Mr. Lawson. RCW 10.01.160(2). Third, during the period when Mr. Lawson was represented, the cost of counsel inhered in the expense required to provide a constitutionally guaranteed jury trial. RCW 10.01.160(2). Fourth, Mr. Lawson waived his right to counsel prior to trial. Nothing in the statute authorizes imposition of attorney fees where an accused person waives the right to counsel. RCW 10.01.160.

For these reasons, the attorney fee assessment must be vacated, and the case remanded for correction of the judgment and sentence. *Hathaway*, 161 Wn. App. at 651-653.

[23] Nor may the court order payment of "expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law." RCW 10.01.160. Here, the record does not indicate whether or not defense counsel belonged to a public defense agency funded in a manner unrelated to specific violations of law.

C. The court violated Mr. Lawson's right to counsel by ordering him to pay the cost of his court-appointed attorney without first inquiring into whether he had the present or future ability to pay.

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

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

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

RCW 10.01.160(3).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn.

App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.[24] *Fuller II*, 417 U.S. at 45.

In *Fuller II*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay them.'" *Id.* The court noted that, under the Oregon scheme, "no requirement to repay may be imposed if it appears *at the time of sentencing* that 'there is no likelihood that a defendant's indigency will end.'" *Id.* (emphasis added). Accordingly, the court found that "the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation…. [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship." *Id.*

Oregon's recoupment statute did not impermissibly chill the exercise of the right to counsel because "[t]hose who remain indigent or

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

for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay". *Fuller II*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller II,* 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller II* to hold that the Sixth Amendment requires a court to find that the offender has the present or future ability to repay the cost of court-appointed counsel before ordering him/her to do so.[25]

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

[25] *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) ("A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment"); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) ("The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn.Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions"); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) ("In view of *Fuller,* we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute").

Fuller II on its head and impermissibly chills the exercise of the right to counsel. *Fuller II*, 417 U.S. at 53.

D. The court lacked authority to order payment of the domestic violence assessment, the expert witness fund contribution, and the crime lab fee.

The court ordered Mr. Lawson to pay a domestic violence assessment of $100. CP 16. This fee may not be imposed except in cases involving domestic violence. *Moreno*, 173 Wn. App. at 499. This case did not involve domestic violence. The court should not have imposed the fee. *Hathaway*, 161 Wn. App. 651-653.

The court also ordered Mr. Lawson to pay $100 toward the "Kitsap County Expert Witness Fund." CP 16. No statute authorizes such a payment. Furthermore, Mr. Lawson was not afforded a defense expert, despite his numerous requests for one. CP 275-282, 309-312, 334-374; RP (11/21/12) 5; RP (1/4/13) 89-90; RP (1/11/13) 3-6; RP (1/14/13) 12.[26] The fee should not have been assessed. *Hathaway*, 161 Wn. App. 651-653.

Finally, the court ordered Mr. Lawson to pay a crime lab fee of $100. CP 16. This fee is authorized by statute, but only in cases where "a crime laboratory analysis was performed by a state crime laboratory."

[26] Nace's treating physicians testified. However, they testified as fact witnesses. RP (1/23/13) 461-465, 479-489.

RCW 43.43.690. Nothing in the record indicates performance of such an analysis. Accordingly, the order directing payment of this fee must be vacated. *Hathaway*, 161 Wn. App. 651-653.

E. The record does not support the sentencing court's finding that Mr. Lawson has the ability or likely future ability to pay his legal financial obligations.

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). This is an error that may be raised at any time, including for the first time on appeal. *Calvin*, 302 P.3d at 521 n. 2 (Wash. Ct. App. 2013).

In this case, the sentencing court entered such a finding without any support in the record. CP 16. Indeed, the record suggests that Mr. Lawson lacks the ability to pay the amount ordered. The court found Mr. Lawson indigent at the beginning of the proceedings. RP (7/9/12) 2-3. He remained indigent at the end of the proceedings. CP 22-23. His lengthy incarceration and felony convictions will negatively impact his prospects for employment. Accordingly, Finding No. 4.1of the Judgment and Sentence must be vacated. *Bertrand*, 165 Wn. App. at 404.

The lower court ordered Mr. Lawson to pay $1135 in fees for his court-appointed attorney without conducting any inquiry into his present

or future ability to pay. CP 16; RP (3/15/13) 2-12. The court violated Mr. Lawson's right to counsel. Under *Fuller II,* it lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had the ability to do so. *Fuller II*, 417 U.S. at 53. The order requiring Mr. Lawson to pay $1135 in attorney fees must be vacated. *Id.*

In addition, the court ordered payment of various other costs and fees. The court should not have assessed these costs and fees without entering a finding, supported by evidence in the record, that Mr. Lawson had the ability to pay.

CONCLUSION

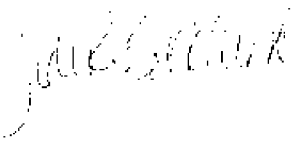
Mr. Lawson's convictions must be reversed. The evidence was insufficient to prove burglary. The burglary charges must be dismissed with prejudice. The evidence was insufficient to prove voyeurism, as charged in count four. That charge must also be dismissed with prejudice. In the alternative, the case must be dismissed without prejudice, because the Information failed to adequately charge each crime.

If the charges are not dismissed, the case must be remanded for a new trial. Mr. Lawson's right to a unanimous decision was infringed. Furthermore, the trial court erroneously allowed the prosecution to prove its case through propensity evidence.

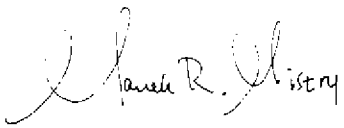
Mr. Lawson's sentence must be vacated. The trial court failed to properly determine Mr. Lawson's criminal history and offender score. Furthermore, the trial court infringed Mr. Lawson's right to counsel by requiring him to pay the cost of counsel without evidence to suggest he has the ability or likely future ability to pay. Finally, the court exceeded its authority by improperly imposing various other costs and fees.

Respectfully submitted on November 27, 2013,

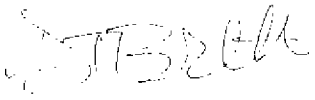
BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Geoffrey Lawson, DOC #334928
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

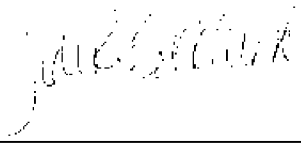
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney
kcpa@co.kitsap.wa.us

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

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

Signed at Olympia, Washington on November 27, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

November 27, 2013 - 12:07 PM

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