No. 45115-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Michael Jackson,

Appellant.

Kitsap County Superior Court Cause No. 13-1-00156-8

The Honorable Judge Kevin D. Hull

Appellant's Reply Brief

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A. The court violated Mr. Jackson's right to confront adverse witnesses by admitting testimonial statements from witnesses whom he had no opportunity to cross-examine.

The confrontation clause prohibits the admission of testimonial statements by a non-testifying witness unless the witness is unavailable and the accused has had a prior opportunity for cross-examination. *State v. Jasper*, 174 Wn.2d 96, 109, 271 P.3d 876 (2012) (*citing Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

A statement is testimonial if it is "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Jasper*, 174 Wn.2d at 115 (*citing Crawford*, 541 U.S. at 52). Here, the trial court admitted notes from a triage nurse and a hospital social worker whom Mr. Jackson never had the opportunity to cross-examine. Ex. 12A, pp. 3-4, 9-10.

Mr. Jackson raised the confrontation problem in the trial court. RP (6/5/13) 339-40. Nonetheless, the state argues that he did not preserve the issue because his attorney did not argue it as extensively as he argued the related evidentiary issues. Brief of Respondent, pp. 7-8. But the state

does not point to any authority holding that issue preservation requires a certain threshold amount of time be spent on discussion of an issue in trial court. Brief of Respondent, pp. 7-8. Mr. Jackson alerted the court to the *Crawford* problem and gave the state an opportunity to respond. RP 339-40. He preserved the issue for appeal.[1]

As noted in Mr. Jackson's Opening Brief, the error in his case arises from the state's failure to call the triage nurse and social worker to testify, not the failure to call Lindsay (the alleged victim) herself.[2] The state does not respond to this argument. Brief of Respondent, pp. 7-13. The state's failure to argue the point can be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). Instead, respondent argues at length that Lindsay's statements to the nurse and social worker were non-testimonial. Brief of Respondent, pp. 9-13 (*citing State v. Williams*, 137 Wn. App. 736, 746, 154 P.3d 322 (2007); *State v. Sandoval*, 137 Wn. App. 532, 538, 154 P.3d 271 (2007); *State v. Saunders*, 132 Wn. App. 592, 603, 132 P.3d 743 (2006); *State v. Moses*,

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[1] Likewise, as the state notes, confrontation errors can be raised for the first time on appeal under RAP 2.5(a)(3). *State v. Kronich*, 160 Wn.2d 893, 899-901, 161 P.3d 982 (2007) *overruled on other grounds by Jasper*, 174 Wn.2d at 116. The state's argument that recent United States Supreme Court authority has called that rule into question is unpersuasive. Brief of Respondent, p. 8. The U.S. Supreme Court has no authority to interpret a Washington state court rule and has never purported to do so.

[2] . If Mr. Jackson had been given the opportunity to cross-examine the authors of the notes in the medical records, Lindsay's statements to those witnesses would have been admissible as non-testimonial statements for the purpose of medical diagnosis or treatment.

129 Wn. App. 718, 730, 119 P.3d 906 (2005); *State v. Fisher*, 130 Wn. App. 1, 13, 108 P.3d 1262 (2005); *State v. O'Cain*, 169 Wn. App. 228, 279 P.3d 926 (2012)). But in each of the cases the state relies upon, the medical professional testified and was subject to cross-examination at trial. The state offers no argument that the statements made by the nurse and social worker were non-testimonial.

Here, Mr. Jackson had no opportunity to cross the triage nurse or social worker, and thus no chance to ask about Lindsay's demeanor, any relevant information that they left out of their notes, or how they reached their conclusions. Respondent misunderstands Mr. Jackson's claim.

The social worker and triage nurse's statements were testimonial under *Crawford*. *Jasper*, 174 Wn.2d at 115. The non-testifying witnesses would have been reasonably aware that their statements would be available for later use at trial. *Id.* This is especially true because Lindsey alleged that she'd been the victim of a crime and the social worker suggested a referral to law enforcement. Ex. 12A, p. 10. Respondent argues only that "there is no evidence whatsoever that AL was aware that the statements she made to the hospital personnel would later be used in court." Brief of Respondent, p. 12. But Mr. Jackson assigns error to the admission of nurse and social worker's statements, not Lindsay's statements. Again, the state misapprehends the issue.

The violation of Mr. Jackson's Sixth Amendment right requires reversal unless the state can show that it is harmless beyond a reasonable doubt. *Jasper*, 174 Wn.2d at 117. The state cannot meet that burden in this case. Because Lindsay did not testify, the jury likely relied heavily on the witnesses who had direct contact with her, including the non-testifying social worker and triage nurse. Their notes contained extensive statements by Lindsay that prejudiced Mr. Jackson, including an alleged back-story to the assault that no other witness could have provided. Ex 12, pp. 9-10. [3] Respondent argues that any error is harmless because of the other evidence that an assault occurred. Brief of Respondent, pp. 15-16. The state cannot establish that the violation of Mr. Jackson's right to confront witnesses was harmless beyond a reasonable doubt. *Jasper*, 174 Wn.2d at 117.

The court violated Mr. Jackson's constitutional right to confront adverse witnesses by admitting testimonial statements from a triage nurse and social worker whom he was unable to cross-examine. *Jasper*, 174 Wn.2d at 117. Mr. Jackson's conviction must be reversed. *Id.*

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[3] Additionally, the evidence that Lindsay's three-centimeter cut amounted to substantial bodily harm was thin. The doctor admitted that he did not know if it left a scar. RP (6/5/14) 381-82. Cross-examination of the other medical professionals the state relied upon could have clarified the issue further.

B. The court violated ER 802 by admitting hearsay that did not fall within an exception to the rule.

Mr. Jackson relies on the argument in his Opening Brief.

II. THE CONTINUANCE VIOLATED MR. JACKSON'S RIGHT TO A SPEEDY TRIAL BECAUSE THE STATE FAILED TO EXERCISE DILIGENCE.

The state has not exercised diligence if it fails to properly subpoena a witness prior to arguing that his/her unavailability requires a continuance. *City of Seattle v. Clewis*, 159 Wn. App. 842, 847, 247 P.3d 449 (2011); *State v. Wake*, 56 Wn. App. 472, 476, 783 P.2d 1131 (1989); *State v. Adamski*, 111 Wn.2d 574, 577, 761 P.2d 621 (1988). A subpoena that has not been properly served is a nullity. *Adamski,* 111 Wn.2d at 578-579.

Here, the court granted the state two continuances beyond the speedy trial date based on the unavailability of state witnesses. The prosecution had not filed proof that those witnesses had been properly subpoenaed. RP (4/11/13) 3-5; RP (5/6/13) 6. The court did not conduct any inquiry into the state's efforts before granting either continuance. RP (4/11/13) 3-5; RP (5/6/13) 6. In an attempt to cure this problem, Respondent now files a declaration, dated 4/23/14, claiming that one witnesses was subpoenaed by mail and that the other was subpoenaed by

email. State's Supp CP (Declaration of L. Myette). Respondent's late effort to demonstrate diligence fails for three reasons.

First, a court abuses its discretion by granting a continuance based on witness unavailability unless the state demonstrates *at the time the issue is raised* that it has exercised diligence in subpoenaing witnesses. *Clewis*, 159 Wn. App. at 847. The state failed to offer any evidence of diligence until well after the trial ended.

Second, even the state's late addition to the record fails to demonstrate proper service of subpoenas. No rule permits service by email. Furthermore, CrR 4.8(a)(3), which permits service by mail, requires the party to send the subpoena "together with a waiver of personal service and instructions for returning such waiver to the attorney of record of the party to the action in whose behalf the witness is required to appear." CrR 4.8(a)(3). Service by mail is not complete until the subpoenaing party files the signed waiver of personal service with the court. CrR 4.8(a)(3).

Respondent's declaration shows that a legal assistant mailed a subpoena to Seifert, but does not indicate that a waiver of personal service was sent to or returned by Seifert. State's Supp CP (Declaration of L. Myette). The state still presents no evidence that Seifert ever received the subpoena or waived personal service. Respondent's attempt to cure the

problem below actually corroborates Mr. Jackson's position: Seifert was not properly subpoenaed. CrR 4.8(a)(3).

Third, private arrangements for other means of service cannot "substitute for the official rules of the court." *Adamski,* 111 Wn.2d at 578-579. Even so, the state claims that the police officer was properly subpoenaed via email pursuant to an internal agreement with the Bremerton Police Department. State's Supp CP (Declaration of L. Myette). But the court rule does not permit service of a subpoena via email. CrR 4.8(a)(3). Rather, it must be served either by personal service or by mail pursuant to a signed waiver of personal service. CrR 4.8(a)(3). Although the state now presents evidence that a subpoena was emailed to the officer, there is no evidence that the officer actually received it and no waiver of personal service. State's Supp CP (Declaration of L. Myette, Appendix B, C). The prosecutor's office's private arrangement with the police department does not permit the state to circumvent the court rule. *Adamski,* 111 Wn.2d at 578-579.

Because the state did not demonstrate that it had taken any steps to secure the attendance of its witnesses, the court abused its discretion by granting the state's motion. *Clewis*, 159 Wn. App. 847; *Adamski*, 111 Wn.2d at 577. In fact, the court did not conduct any inquiry into whether the state had exercised diligence in securing the attendance of the

witnesses. The court's failure to apply the correct legal standard, likewise, constitutes an abuse of discretion. *Hidalgo v. Barker*, 176 Wn. App. 527, 309 P.3d 687 (2013).

Mr. Jackson objected to each improper continuance and moved for dismissal pretrial. RP (4/11/13) 2; RP (5/6/13) 5; RP (6/3/13) 50-53; CP 38-39. Even so, the state argues that the speedy trial issue is not preserved for appeal because Mr. Jackson did not object based on lack of diligence. Brief of Respondent, pp. 22. This is incorrect.

Mr. Jackson argued that the court needed to examine "whether or not this could have been avoided." RP (5/6/13) 5. His attorney pointed out that the state had not mentioned whether the witnesses' absences where something that the prosecutor could have found out about earlier. RP (5/6/13) 5. In short, Mr. Jackson argued that the state had not demonstrated that it had exercised diligence in securing the witnesses' attendance at trial. RP (5/6/13) 5. This issue is preserved for review.

Violation of the speedy trial rule requires that Mr. Jackson's conviction be dismissed and the case dismissed with prejudice. CrR 3.3(h); *Adamski*, 111 Wn.2d at 583.

III. THE FACTS OF MR. JACKSON'S CASE SUPPORTED A JURY INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF ASSAULT FOUR.

A. Mr. Jackson had an unqualified right to have the jury consider the lesser offense of fourth degree assault.

An accused person has an "unqualified" statutory right to have the jury instructed on applicable inferior-degree offenses if there is "even the slightest evidence" that s/he may have committed only that offense. *State v. Parker,* 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984) (citing *State v. Young*, 22 Wash. 273, 276-277, 60 P. 650 (1900)); RCW 10.61.003. The instruction should be given even if there is contradictory evidence, or if the accused presents other defenses. *State v. Fernandez-Medina,*141 Wn.2d 448, 6 P.3d 1150 (2000).

Respondent agrees that fourth degree assault is legally a lesser included offense of second degree assault. Brief of Respondent, p, 27.

When assessing whether the evidence meets the factual prong of the *Workman* test, the court must take the evidence in the light most favorable to the accused. *State v. Henderson*, --- Wn. App. ---, 321 P.3d 298, 300 (2014). Mr. Jackson elicited on cross-examination that the doctor who treated Lindsay did not know whether the three-centimeter cut on her head left a visible scar. RP (6/5/13) 381-83. The doctor testified that he had not seen Lindsay since he treated her. RP (6/5/13) 381. He

also told jurors that minor cuts frequently require stitches. RP (6/5/13) 383-84. This evidence demonstrated that Lindsay's injuries could have qualified as less than the substantial bodily harm required for second degree assault. RCW 9A.36.021(1)(a).

Taken in the light most favorable to Mr. Jackson, the evidence supported a finding that Lindsay did not suffer substantial bodily harm. *State v. Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008). This was more than enough to meet the "slightest evidence" threshold for the *Workman* test. *Id.; Parker,* 102 Wn.2d at 163-164. Still, respondent argues that the facts of Mr. Jackson's case do not support an instruction on fourth degree assault. Brief of Respondent, pp. 28-29 (*citing State v. Speece*, 115 Wn.2d 360, 363, 798 P.2d 294 (1990)). In *Speece*, however, the accused did not present any evidence to rebut the state's claim that he was armed with a gun. *Id.* at 363. Speece's argument for a lesser-included instruction rested solely on the fact that the jury could have disbelieved the state's evidence. *Id.* Here, there was a legitimate factual controversy regarding whether Lindsay suffered serious bodily harm, as brought out during Mr. Jackson's cross-examination of her doctor. RP (6/5/13) 381-84. The state's reliance on *Speece* is misplaced.

The court abused its discretion by failing to apply the proper legal standard to the facts of Mr. Jackson's case. This violated Mr. Jackson's "unqualified right" to have the jury instructed on an applicable lesser-included offense. *Barker*, 176 Wn. App. 527; *Parker,* 102 Wn.2d at 163-164. His conviction must be reversed. *Parker*, 102 Wn.2d at 166.

B. The trial judge infringed Mr. Jackson's state and federal due process rights to instructions on a lesser-included offense.

Mr. Jackson relies on the argument in his Opening Brief.

C. The court's failure to instruct on fourth degree assault prejudiced Mr. Jackson because the evidence supported the proposed instruction.

Mr. Jackson relies on the argument in his Opening Brief.

IV. THE PROSECUTOR COMMITTED EXTENSIVE, FLAGRANT, AND ILL-INTENTIONED MISCONDUCT DURING CLOSING ARGUMENT.

A. The prosecutor committed flagrant and ill-intentioned misconduct by encouraging the jury to convict Mr. Jackson in order to stand up for victims of domestic violence and to give them "a voice"

A prosecutor commits misconduct by encouraging the jury to rely on passion, prejudice, or sympathy for the alleged victim. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012); *Moore v. Morton*, 255 F.3d 95, 117 (3d Cir. 2001). Here, the prosecutor invited the jury to convict Mr. Jackson because:

> [V]ictims of domestic violence need a voice. They do. Even when they're not potentially strong enough to stand up on their own, they need someone to stand up for them. And that's why we're here today.
> RP (6/6/13) 527-28.

The state asserts that this was not an appeal to sympathy but an explanation of how the state had proved its case even though Lindsay had not testified. Brief of Respondent, pp. 33-34. But the argument does not mention Lindsay but "victims of domestic violence," in general. RP (6/6/13) 527-28. The prosecutor's references to all victims of domestic violence had nothing to do with the evidence or specifics of Mr. Jackson's case. Furthermore, even a call for the jury to give a voice to Lindsay, herself, would have been improper. *Moore,* 255 F.3d at 117. The prosecutor's admonition for the jury to "stand up for" victims of domestic violence, in general, renders the statement flagrant, ill-intentioned, and prejudicial.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by encouraging the jury to convict based on passion, prejudice, and sympathy for victims of domestic violence. *Glasmann*, 175 Wn.2d at 704. Mr. Jackson's conviction must be reversed. *Id.*

B. The prosecutor committed misconduct by stating that defense counsel's arguments left him "at a loss for words."

A prosecutor's arguments impugning the role or integrity of defense counsel "can severely damage an accused's opportunity to present his or her case and are therefore impermissible." *State v. Lindsay*, (No. 88437-4), 2014 WL 1848454, --- Wn.2d ---, --- P.3d --- (May 8, 2014) (slip op. at 8).

The unanimous *Lindsay* court held that the prosecutor's statement that the defense attorney's argument was "a crock" required reversal. *Id.* (slip op. at 10-11). Similarly, here, the prosecutor stated that Mr. Jackson's arguments left him "at a loss for words." RP (6/6/13) 563-64. He told the jury that he hoped the arguments left them "at a loss for words" as well. RP (6/6/13) 565. Even so, respondent argues that the prosecutor's comments were proper because they were a response to Mr. Jackson's argument. Brief of Respondent, pp. 35-36.

An accused person cannot invite or open the door to prosecutorial misconduct. *State v. Jones*, 144 Wn. App. 284, 295, 183 P.3d 307 (2008). Furthermore, the prosecutor's "response" did not point to the evidence in the case or the jury instructions. Instead, it provided a personal opinion and impugned the integrity of defense counsel and, therefore, of Mr. Jackson's defense. Such an argument was improper and "severely

damaged" Mr. Jackson's "opportunity to present his [] case." *Lindsay*, (slip op. at 8).

The prosecutor committed prejudicial misconduct by disparaging defense counsel in closing argument rather than focusing on the facts of the case. *Lindsay*, (slip op. at 8). Mr. Jackson's conviction must be reversed. *Jones,* 144 Wn. App. at 284.

C. The prosecutor committed misconduct by comparing the state's burden of proof to the jury's knowledge that the earth is round.

A prosecutor commits misconduct by mischaracterizing or trivializing the beyond a reasonable doubt standard by comparing it to everyday decisions. *Lindsay* (slip op. at 11-14)

At Mr. Jackson's trial, the prosecutor compared a finding of guilt beyond a reasonable doubt to a belief that the earth is round or that the prosecutor is an attorney. RP (6/6/13) 515, 567. These arguments require reversal because they "improperly trivialize[d] the gravity of the standard and the jury's role." *Lindsay* (slip op. at 14).

In *Lindsay*, the prosecutor compared the beyond a reasonable doubt standard to the determination that it is safe to cross the street. *Id.* Similarly, the prosecutor's arguments here likened finding Mr. Jackson guilty to things that are common knowledge. Even so, the state argues that the prosecutor's arguments actually emphasized the state's burden.

Brief of Respondent, p. 38. Respondent does not elaborate upon how comparison of the reasonable doubt standard to knowledge that the earth is round could have properly stated – much less emphasized – the state's burden. Brief of Respondent, pp. 36-40.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by minimizing the state's burden of proof. *Lindsay* (slip op. at 11-14). Mr. Jackson's conviction must be reversed. *Id.*

D. The cumulative prejudicial effect of the prosecutor's repeatedly improper arguments requires reversal of Mr. Jackson's conviction.

The cumulative effect of repeated instances prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *Lindsay* (slip op. at 23).

Here, the prosecutor committed misconduct by encouraging the jury to convict Mr. Jackson in order to "stand up for" domestic violence victims; impugning defense counsel; and trivializing the state's burden of proof. Nonetheless, the state argues that reversal is not required because some of the prosecutor's arguments were proper. Brief of Respondent, pp. 41-45. But the proper arguments were insufficient to undo the prejudicial weight of the improper ones.

The cumulative effect of prosecutor's improper arguments requires reversal of Mr. Jackson's conviction. *Lindsay* (slip op. at 23).

V. MR. JACKSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Jackson relies on the arguments above and in his Opening Brief.

VI. THE COURT VIOLATED MR. JACKSON'S RIGHT TO COUNSEL BY ORDERING HIM TO PAY THE COST OF HIS COURT-APPOINTED ATTORNEY; THE STATE CONCEDES THAT THE COURT EXCEEDED ITS AUTHORITY BY ORDERING MR. JACKSON TO PAY SEVERAL OTHER UNAUTHORIZED FEES.

A. The state does not point to any statute granting the court the authority to order Mr. Jackson to pay the cost of court-appointed counsel.

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). The court may order an offender to pay "expenses specially incurred by the state in prosecuting the defendant" or "expenses inherent in providing a constitutionally guaranteed jury trial." RCW 10.01.160(2). Nonetheless, the court ordered Mr. Jackson to pay $1135 for the cost of his court-appointed attorney. CP 17.

The state does not point to any statute granting the court the authority to impose the cost of a constitutionally-mandated public defense attorney. Brief of Respondent, pp. 48-49. The absence of argument on the issue can be treated as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

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.

B. The court violated Mr. Jackson's right to counsel by ordering him to pay the cost of his court-appointed attorney in a manner that impermissibly chills the exercise of that right.

A court impermissibly chills the exercise of the right to counsel by ordering an indigent person to pay the cost of a court-appointed attorney without first inquiring into whether s/he has the present or future ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). The court ordered Mr. Jackson to pay $1135 in attorney's fees, despite also finding him indigent at the end of the proceeding. CP 17, 34-36. Without analysis, the state asserts that assessment of the cost of court-appointed counsel does not violate the constitution. Brief of Respondent, p. 49 (*citing State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1977); *State v. Baldwin*, 63 Wn. App. 303, 311, 818 P.2d 1116 (1991)). But the court in *Barklind* conditioned its order by providing that the accused would only ever be required to pay if he had the financial ability to do so. *Barklind*, 87 Wn.2d at 815. Here, on the other hand, Mr. Jackson was ordered to pay despite the fact that he would be unable to do so. Likewise, the accused in *Baldwin* raised only that the court erred by not making specific findings of fact. *Baldwin*, 63 Wn. App. at 308-09. Mr. Jackson

challenges the scheme as a whole, not the lack of specificity in the court's findings. The state's reliance on *Barklind* and *Baldwin* is misplaced.

As argued in Mr. Jackson's Opening Brief, the Washington scheme of ordering everyone to pay the cost of court-appointed counsel and prohibiting challenges to the practice until the state seeks to actually collect payment turns *Fuller* on its head and impermissibly chills the right to counsel. *Fuller,* 417 U.S. at 45. Even so, respondent argues that Mr. Jackson's claim is not ripe because the state has not yet sought to collect. Brief of Respondent, pp. 48-49 (*relying on State v. Bertrand*, 165 Wn. App. 393, 405, 267 P.3d 511 (2011); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008)). But neither *Bertrand* nor *Crook* addresses the Sixth Amendment claim Mr. Jackson raises, or any constitutional claim at all. The Constitution does not permit the system the state advocates. *Fuller*, 417 U.S. at 45.

C. The state concedes that the court lacked authority to order payment of the domestic violence assessment, the expert witness fund contribution, and the special assault unit contribution.

The state concedes that the court exceeded its authority by ordering Mr. Jackson to pay a $100 domestic violence assessment, a $100 contribution to the "Kitsap County Expert Witness Fund," and a $500 contribution to the "Kitsap County Special Assault Unit." Brief of

Respondent, p. 49. For the reasons set forth in Mr. Jackson's Opening Brief, the court should accept the state's concession.

D. There is no evidence to support the sentencing court's finding that Mr. Jackson had the 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 (LFOs). *Bertrand*, 165 Wn. App. at 404. In this case, the sentencing court entered such a finding without any support in the record and despite finding Mr. Jackson indigent at the end of trial. CP 17, 34-36.

The state does not point to any evidence supporting the court's finding that Mr. Jackson had the ability to pay any LFOs. Brief of Respondent, p. 48. Instead, respondent claims that "neither statute nor the constitution requires the trial court to enter formal, specific findings about a defendant's ability to pay LFOs." Brief of Respondent, p. 48 (*citing State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)). But Mr. Jackson does not assign error to the level of detail in the court's findings of fact. Rather, the court checked the box next to a boilerplate finding without conducting any inquiry into the issue and actually making a contradictory finding that Mr. Jackson was indigent.

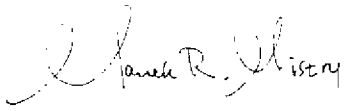
The court's finding must be vacated because it has no evidentiary support. *Bertrand*, 165 Wn. App. at 404.

CONCLUSION

For the reasons set forth above and in the Opening Brief, Mr. Jackson's conviction must be reversed. In the alternative, his case must be remanded and the orders for him to pay attorneys fees and other unauthorized costs must be vacated.

Respectfully submitted on May 19, 2014,

BACKLUND AND MISTRY



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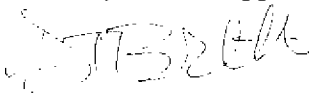

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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

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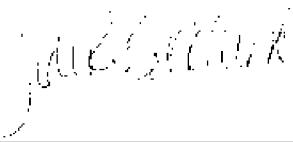
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 May 19, 2014.



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