FILED
MAR 31, 2014
Court of Appeals
Division III
State of Washington

No. 31940-7-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

GRANT W. SCANTLING,
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Robert G. Swisher, Judge

BRIEF OF APPELLANT

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2. The trial court erred in allowing evidence of threats made by Mr. Scantling to Palmer.

3. Mr. Scantling was denied his constitutional right to effective assistance of counsel, when his attorney failed to object to the admission of the handwritten letters found in Mr. Scantling's residence and the evidence regarding the March 19, 2013 incident.

4. The prosecutor committed misconduct in opening and closing arguments by improperly appealing to the jury's passions and prejudices, and by stating his personal belief about the credibility of a witness.

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

6. The trial court erred by imposing discretionary costs.

Issues Pertaining to Assignments of Error

1. Did the trial court abuse its discretion in allowing evidence of a prior assault of Palmer by Mr. Scantling, contrary to ER 404(b)?

2. Did the trial court abuse its discretion in allowing evidence of threats made by Mr. Scantling to Palmer?

3. Was Mr. Scantling denied his constitutional right to effective assistance of counsel, when his attorney failed to object to the admission of the handwritten letters found in Mr. Scantling's residence and the evidence regarding the March 19, 2013 incident?

4. Did the prosecutor commit misconduct in opening and closing arguments by improperly appealing to the jury's passions and prejudices, and by stating his personal belief about the credibility of a witness?

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

6. Did the trial court abuse its discretion in imposing discretionary costs where it did not take Mr. Scantling's financial resources into account, nor consider the burden it would impose on him, as required by RCW 10.01.160?

B. STATEMENT OF THE CASE

Grant Scantling and Ann Marie Krebs lived together in Kennewick with their two children and Krebs' son from a previous relationship. 2 RP 128-129, 208-209, 211, 223-225.[1] Two other men, Michael Billado and Franklin Palmer, occasionally stayed at their residence. 2 RP 129-130, 208, 225. Around Thanksgiving 2012, Mr. Scantling moved out of the Kennewick residence, to Spokane. 1 RP 319-321, 338-339; 2 RP 129, 208, 226.

On March 21, 2013, Krebs went to sleep with her three children in her bed. 2 RP 209-210, 229. Billado and Palmer were also at the residence. 2 RP 130-131, 140, 229-230, 245.

The next morning Krebs awoke to a loud crash and saw broken glass; the sliding glass door in her bedroom had been broken. 2 RP 131-132, 142, 210-211, 231-233. She then saw Mr. Scantling. 2 RP 211, 233. Mr. Scantling confronted Krebs. 2 RP 211, 233-234. He fired a gunshot towards the bedroom door and the adjacent hallway. 2 RP 213, 234-235. Mr. Scantling left the bedroom and went into the hallway. 2 RP 234-236. Krebs saw Palmer fall to the ground in the hallway. 2 RP 236.

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[1] The Report of Proceedings consists of seven volumes. Two consecutively paginated volumes, reported by Cheryl A. Pelletier, are referred to as "1 RP" herein. Three consecutively paginated volumes, reported by Lisa S. Lang, are referred to as "2 RP" herein. References to the other volumes include the date.

According to Krebs, "[w]hen [Palmer] fell, I saw [Mr. Scantling] walk up over him . . .and shoot him again . . . ." 2 RP 236-237. Krebs' son testified he heard three gun shots; the first one while Mr. Scantling was in the bedroom, and the next two when Mr. Scantling was in the hallway. 2 RP 212-214. Palmer died as a result of multiple gunshot wounds. 2 RP 81.

Law enforcement officers obtained a search warrant for Mr. Scantling's residence in Spokane. 1 RP 372. Inside the officers found several handwritten letters written by Mr. Scantling. 1 RP 373-383; State's Exs. 20, 21, 22.

The State charged Mr. Scantling with one count of first degree burglary and one count of aggravated premeditated first degree murder. CP 3-4. The case proceeded to a jury trial. 1 RP 243-436; 2 RP 56-441.

In its opening statement, the State told the jury:

> Our role in this case is to seek justice. And we'll hear the evidence that will give you the tools to come back with a verdict that will give justice to [Mr.] Palmer and give justice to our community. And that verdict will be that [Mr. Scantling] is guilty.

1 RP 255.

The State also read from the letters found in Mr. Scantling's residence in Spokane. 1 RP 254-255.

The State moved to admit evidence of a prior assault of Palmer by Mr. Scantling through the testimony of Billado pursuant to ER 404(b). CP 37-41; RP (Aug. 28, 2013) 70-71; 2 RP 156-172. The State argued the evidence was admissible to show absence of mistake or accident, motive, disposition, and the relationship between Mr. Scantling and Palmer. CP 37-41; 2 RP 157, 166-167, 170-171. The State also argued the evidence was admissible to rebut Mr. Scantling's self-defense claim. 2 RP 166. However, Mr. Scantling did not argue self-defense at trial. 2 RP 369.

Mr. Scantling objected to the admission of the evidence of the prior assault. CP 42-55; 2 RP 156-159, 167-168, 171-172. In an offer of proof Billado stated that Mr. Scantling hit Palmer and then made comments to Palmer about sleeping with Krebs. 2 RP 162-163. However, Billado later admitted Mr. Scantling did not actually make those comments, but that he, Billado, knew that Palmer was sleeping with Krebs. 2 RP 165. Mr. Scantling argued the evidence was inadmissible, because it was only speculation what the two men were arguing about. 2 RP 167. Mr. Scantling also argued there was no domestic relationship between himself and Palmer, and no pattern of abuse. 2 RP 167-168.

The trial court ruled the evidence was admissible, stating that the prior assault was relevant, even without self-defense, based on the representations made by the State. 2 RP 161-165, 169-170, 172-173.

Billado testified that sometime around Christmas, he saw Mr. Scantling hit Palmer, at the Kennewick residence. 2 RP 173-174, 176, 179, 181. Billado testified Mr. Scantling "came barging through the door upset[,]" and the two men got into a confrontation. 2 RP 175, 179-181. He testified Mr. Scantling told Palmer to leave the house. 2 RP 176. Billado did not testify regarding a reason for the confrontation. 2 RP 175-176. He testified "[n]ot knowing what was going on, I opened my eyes and I shut my eyes. It's none of my business." 2 RP 179.

Krebs testified that on March 19, 2013, three days before the shooting, Mr. Scantling came to the Kennewick residence. 2 RP 227-228, 243-244. The last time she saw Mr. Scantling prior to this visit was around New Year's Eve. 2 RP 228, 243. Krebs stated that when she saw Mr. Scantling at the door "I freaked out, and I slammed the door in his face." 2 RP 243. She testified she was scared at the time. 2 RP 243. Krebs testified she texted him later that night. 2 RP 243. Defense counsel did not object to this testimony or to Krebs' son testifying about Mr. Scantling coming to the residence on March 19, 2013. 2 RP 218-220, 227-228, 243-244.

On cross-examination, defense counsel asked Krebs if Mr. Scantling responded to her text messages sent between March 19th and March 22nd, and she said "no." 2 RP 245. Krebs testified Mr. Scantling

was texting her before that time. 2 RP 246. Defense counsel questioned Krebs regarding these text messages:

> [Defense counsel:] Okay. And none of the texts that he sent you were threatening [Palmer] in any way?
> [Krebs:] No.
> [Defense counsel:] None of them said, "I'm going to kill [Palmer]"?
> [Krebs:] No, not at all.

2 RP 246.

On re-direct, over Mr. Scantling's objection the State sought to ask Krebs if Mr. Scantling ever made any threats against Palmer to her. The State argued defense counsel had opened the door to this questioning by asking Krebs if Mr. Scantling had ever texted any threats. 2 RP 247-249. The trial court ruled defense counsel had opened the door, and allowed the questioning. 2 RP 249. The State proceeded with its re-direct:

> [The State:] . . . Ms. Krebs, do you remember you were just asked a couple minutes ago whether or not the defendant had texted you anything about threatening [Palmer]; do you remember that?
> [Krebs:] Yes.
> [The State:] Let's forget about the texts. Were there any times when the defendant threatened [Palmer] in a conversation with you?
> [Krebs:] Let me - - yes is the answer, but I mean I can't remember exactly when.
> [The State:] Okay.
> [Krebs:] A couple weeks before.
> [The State:] Tell us what he said.
> [Krebs:] He just said that he was going to kick his butt, basically, I guess.

> [The State:] And was this before - - did you ever tell [Mr.] Scantling that you had at least some sort of romantic or physical relationship with [Palmer]?
> [Krebs:] At one time I did, and I told him that after we broke up.
> [The State:] And was the defendant's threat to kick [Palmer's] butt, was it before or after you told that to [Mr. Scantling]?
> [Krebs:] It was after.
> [The State:] Okay. And was that an in-person conversation or how did that conversation - -
> [Krebs:] It was in person.

2 RP 249-250.

The State admitted into evidence, and a witness read to the jury, the handwritten letters found in Mr. Scantling's residence in Spokane. 1 RP 373-383; State's Exs. 20, 21, 22. The letters discuss Krebs and their children, and what happened when Mr. Scantling went to the Kennewick residence on March 19. 1 RP 373-383; State's Exs. 20, 21, 22. The letters do not mention Palmer or Billado. 1 RP 373-383; State's Exs. 20, 21, 22. Defense counsel did not object to the admission of the letters. 1 RP 373-384.

The State also admitted into evidence, and played for the jury, Mr. Scantling's taped interview given to law enforcement on the day of the shooting. 2 RP 261-263. The interview discusses Mr. Scantling coming to Krebs' residence on March 19, 2013. 2 RP 169, 261-263. Defense counsel did not object to the admission of the interview. 2 RP 263.

The trial court instructed the jury that in order to find Mr. Scantling guilty of first degree murder, it had to find:

> (1) That on or about the 22nd day of March, 2013, [Mr. Scantling] acted with intent to cause the death of another person;
> (2) That the intent to cause the death was premeditated;
> (3) That . . . Palmer died as a result of [Mr. Scantling's] acts; and
> (4) That any of these acts occurred in the State of Washington.

CP 135.

In closing argument, the prosecutor apologized for showing the jury pictures of Palmer, and referred to them as "sad, gruesome pictures." 2 RP 396. The prosecutor also argued the following regarding the testimony of Krebs' son:

> [Krebs' son] was not on that stand lying. If you talk about any kid that is nervous and not taking sides but just wants to tell the truth, that's [Krebs' son]. But think about kids that you know, and think about kids who see their mom scared. Is that something a kid is going to lie about?

2 RP 404.

The prosecutor argued that a man that cares about his kids does not take the actions that Mr. Scantling took on the day of the shooting. 2 RP 405-406. The prosecutor then asked the jury, "[w]hat message is [Mr. Scantling] giving his kids?" 2 RP 406. Mr. Scantling objected to this argument, and the trial court overruled the objection. 2 RP 406.

The prosecutor told the jury, "[t]his trial is seeking justice for . . . Palmer, for our community, and to hold [Mr. Scantling] accountable." 2 RP 410.

The prosecutor also referenced and read portions of the letters found in Mr. Scantling's residence in Spokane. 2 RP 390, 407-409. While reading from the letters, the prosecutor argued "[t]his was a premeditated act." 2 RP 408.

In his closing argument, defense counsel argued that the letters found in Mr. Scantling's residence in Spokane "are not evidence of premeditation for killing . . . Palmer." 2 RP 419-420. Defense counsel argued the letters were prejudicial, and only admitted into evidence to make the jury not like Mr. Scantling. 2 RP 419-420.

On rebuttal the prosecutor mentioned the prior assault of Palmer by Mr. Scantling. 2 RP 435.

The jury found Mr. Scantling guilty as charged. CP 144-147; 2 RP 445-446. At sentencing, the trial court imposed discretionary costs of $24,967.73[2], and mandatory costs of $6,036[3], for a total Legal Financial Obligation (LFO) of $31,003.73. CP 150, 156; RP (Sept. 19, 2013) 5-6.

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[2] $100 Clerk's Fee for FTA Warrants; $125 Sherriff's Service Fee; $250 Jury Demand Fee; $449.73 Witness Fees; $6,435 Attorney's Fees; and $17,608 Special Costs Reimbursement.CP 156; RP (Sept. 19, 2013) 5.

[3] $200 Filing Fee, $500 Victim Assessment, $100 DNA collection fee, and $5,236 in restitution. CP 150, 156; RP (Sept. 19, 2013) 5-6.

The trial court made no express finding that Mr. Scantling had the present or future ability to pay the LFOs. CP 147-156; RP (Sept. 19, 2013) 2-7. The Judgment and Sentence contains the following language:

> **2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

CP 149.

The trial court did not inquire into Mr. Scantling's financial resources, and the nature of the burden that payment of LFOs would impose. RP (Sept. 19, 2013) 2-7. The trial court ordered Mr. Scantling to make monthly payments as follows:

> [X] The defendant shall pay up to $50.00 per month to be taken from any income the defendant earns while in the custody of the Department of Corrections. This money is to be applied towards legal financial obligations.

CP 151.

Mr. Scantling appealed. CP 157.

C. ARGUMENT

1. The trial court abused its discretion in allowing evidence of an assault of Palmer by Mr. Scantling, contrary to ER 404(b).

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

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

ER 404(b).

In order to admit evidence under ER 404(b), the trial court must follow four steps: "'(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.'" *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007) (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). "This analysis must be conducted on the record." *Id*. (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)). "In doubtful cases, the evidence should be excluded." *Thang*, 145 Wn.2d at 642 (citing *Smith*, 106 Wn.2d at 776).

The trial court's interpretation of ER 404(b) is reviewed de novo. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009) (citing *Foxhoven*, 161 Wn.2d at 174). If the trial court correctly interprets the rule, its decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *Id*. (citing *Foxhoven*, 161 Wn.2d at 174). "A trial

court abuses its discretion where it fails to abide by the rule's requirements." *Id*. (citing *Foxhoven*, 161 Wn.2d at 174). In addition, "[d]iscretion is abused if it is exercised on untenable grounds or for untenable reasons." *Thang*, 145 Wn.2d at 642 (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Here, the State moved to admit evidence, pursuant to ER 404(b), of a prior assault of Palmer by Mr. Scantling, through the testimony of Billado. CP 37-41; RP (Aug. 28, 2013) 70-71; 2 RP 156-172. Mr. Scantling objected. CP 42-55; 2 RP 156-159, 167-168, 171-172. The trial court ruled the evidence was admissible. 2 RP 161-165, 169-170, 172-173. Billado testified that sometime around Christmas, he saw Mr. Scantling hit Palmer, at the Kennewick residence. 2 RP 173-174, 176, 179, 181. However, Billado did not testify regarding a reason for the confrontation (2 RP 175-176, 179) and the trial court did not determine whether the evidence was relevant to prove an element of the charged crimes. 2 RP 161-165, 169-170, 172-173; *see also Foxhoven*, 161 Wn.2d at 174 (citing *Thang*, 145 Wn.2d at 642). The trial court also failed to weigh the probative value of the evidence against its prejudicial effect. 2 RP 161-165, 169-170, 172-173; *see also Foxhoven*, 161 Wn.2d at 174 (citing *Thang*, 145 Wn.2d at 642).

The prejudicial effect of the evidence of the prior assault of Palmer by Mr. Scantling outweighs its probative value. There was no evidence presented as to why this assault occurred. 2 RP 175-176, 179. Without further details regarding the reason for the altercation, the fact that Mr. Scantling struck Palmer on a prior occasion is not probative of a motive to kill Palmer, or of premeditated intent to do so. Furthermore, any probative value is outweighed by the prejudice generated by the evidence--that Mr. Scantling is violent person and therefore acted in conformity with this trait at the time of the shooting. Under these circumstances evidence of the prior assault of Palmer by Mr. Scantling was more prejudicial than probative.

This error was exacerbated by the State's mention of the prior assault of Palmer by Mr. Scantling in its rebuttal closing argument. 2 RP 435; *see also Thang*, 145 Wn.2d at 645 (finding the potential prejudice of evidence admitted under ER 404(b) outweighed its probative value, based in part upon the mention of the evidence in the State's closing argument). Therefore, evidence of the prior assault should have been excluded by the trial court under ER 404(b). The trial court abused its discretion by failing to follow the rule's requirements. *See Fisher*, 165 Wn.2d at 745 (citing *Foxhoven*, 161 Wn.2d at 174).

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

Here, the error in admitting the ER 404(b) evidence was not harmless. The evidence that Mr. Scantling acted with premeditated intent to cause the death of another person was not overwhelming. Accordingly, Mr. Scantling's convictions should be reversed and the case remanded for a new trial.

2. <u>The trial court abused its discretion in allowing evidence of threats made by Mr. Scantling to Palmer</u>.

Under the "open door" rule, if one party raises a material issue, the opposing party is generally permitted to "explain, clarify, or contradict the evidence." *State v. Berg,* 147 Wn. App. 923, 939, 198 P.3d 529 (2008) *abrogated on other grounds by State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011) (citing *State v. Price,* 126 Wn. App. 617, 109 P.3d 27 (2005)); *see also Ang v. Martin*, 118 Wn. App. 553, 562, 76 P.3d 787 (2003). The rationale for the rule is as follows:

> This is the long-recognized rule that when a party opens up a subject of inquiry, that party "contemplates that the rules will permit cross-examination or redirect examination . . . within the scope of the examination in which the subject matter was first introduced." Otherwise, "[t]o close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths."

Id. (alterations in original) (quoting *State v. Gefeller,* 76 Wn.2d 449, 455, 458 P.2d 17 (1969)).

A trial court's decision under the open door rule is reviewed for an abuse of discretion. *State v. Ortega*, 134 Wn. App. 617, 626, 142 P.3d 175 (2006). An abuse of discretion occurs when a trial court's decision is "manifestly unreasonable or exercised on untenable grounds or for untenable reasons[,]" or "when the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *State v. Ramirez-Estevez*, 164 Wn. App. 284, 289-90, 263 P.3d 1257 (2011) (citing *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007)).

Here, on cross-examination defense counsel asked Krebs if Mr. Scantling threatened Palmer in text messages he sent her around the time of the incident. 2 RP 246. Over objection the trial court ruled defense counsel opened the door and allowed the State to ask Krebs if Mr. Scantling ever made any threats against Palmer to her. 2 RP 249.

This questioning was not "within the scope of the examination in which the subject matter was first introduced." *Berg*, 147 Wn. App. at 939 (quoting *Gefeller*, 76 Wn.2d at 455). The subject matter first introduced was whether Mr. Scantling ever threatened Palmer in text messages to Krebs around the time of the incident, not whether Mr. Scantling had ever in text messages or otherwise made any threats against Palmer to Krebs. 2 RP 246. By questioning Krebs regarding threats in text messages around the time of the incident, defense counsel did not open the door to the wider question of whether Mr. Scantling had ever threatened Palmer. The evidence offered by the State did not "explain, clarify, or contradict the evidence[,]" but rather, was outside the scope of the evidence presented by the defense. *See Berg*, 147 Wn. App. at 939 (citing *Price*, 126 Wn. App. at 617). Therefore, the trial court abused its discretion by allowing the State to ask Krebs if Mr. Scantling ever made any threats against Palmer to her.

Not harmless error. It may be harmless error to improperly admit evidence. *Ramirez-Estevez*, 164 Wn. App. at 293 (citing *State v. Bashaw*, 169 Wn.2d 133, 143, 234 P.3d 195 (2010)). An error is harmless unless it affects or presumptively affects the outcome of the case. *Brown v. Spokane Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Here, allowing the State to ask Krebs if Mr. Scantling ever made any

threats to Palmer to her was not harmless error. This testimony went directly to the disputed issue of whether Mr. Scantling acted with premeditated intent to cause the death of Palmer. The other evidence on this issue was not overwhelming. Mr. Scantling's convictions should be reversed and remanded for a new trial. *See State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993) (setting forth this remedy for evidentiary errors).

3. Mr. Scantling was denied his constitutional right to effective assistance of counsel, when his attorney failed to object to the admission of the handwritten letters found in Mr. Scantling's residence and the evidence regarding the March 19, 2013 incident.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

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

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

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

To prove that the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show "that the failure to object fell below prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would have been different if the evidence had not been admitted[,]"and that the decision was not tactical. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007). Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). However, "strategy must be based on reasoned decision-making[.]" *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007).

Here, the State admitted into evidence and a witness read to the jury the handwritten letters found in Mr. Scantling's residence in Spokane. 1 RP 373-383; State's Exs. 20, 21, 22. The letters discuss Krebs and their children and what happened when Mr. Scantling went to the Kennewick

residence on March 19. 1 RP 373-383; State's Exs. 20, 21, 22. The letters do not mention Palmer or Billado. 1 RP 373-383; State's Exs. 20, 21, 22. The State also presented evidence of Mr. Scantling going to the Kennewick residence on March 19 and Krebs slamming the door in his face. 2 RP 218-220, 227-228, 243-244. The State further admitted into evidence Mr. Scantling's taped interview to law enforcement, which discusses him coming to Krebs' residence on March 19. 2 RP 169, 261-263.

An objection to this evidence would have been sustained. *See Sexsmith*, 138 Wn. App. at 509. In order to convict Mr. Scantling of first degree murder of Palmer, the State had to prove Mr. Scantling acted with the premeditated intent to cause the death of another person and that Palmer died as a result of that act. CP 135; *see also* RCW 9A.32.030(1)(a) (first degree premeditated murder). Under the facts presented at trial the jury had to find premeditated intent towards Palmer or Billado but not towards Krebs. The handwritten letters and the March 19 incident related only to the relationship between Krebs and Mr. Scantling. The evidence did not address Palmer or Billado. 1 RP 373-383, 2 RP 169, 218-220, 227-228, 243-244, 261-263; State's Exs. 20, 21, 22. Thus, the evidence was not relevant because it did not pertain to the premeditated intent element the State had to prove at trial. *See* ER 401

(defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Even if it was minimally relevant the evidence would have been excluded because "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." ER 403. The evidence was highly prejudicial, portraying Mr. Scantling as a violent person and including a threat to kill Krebs. 1 RP 373-383; State's Exs. 20, 21, 22. The evidence also confused the issue of whom the premeditation intent had to be directed toward--Krebs as opposed to Palmer or Billado.

Defense counsel's deficient performance prejudiced Mr. Scantling. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). There is a reasonable probability that absent this error the results of the trial would have been different. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26); *see also Sexsmith*, 138 Wn. App. at 509. The evidence that Mr. Scantling acted with premeditated intent to cause the death of Palmer or Billado was not overwhelming. The irrelevant evidence--the handwritten letters and the March 19 incident--took the jury's focus away from the required finding of premeditated

intent and instead focused the jury on the relationship between Mr. Scantling and Krebs. The State emphasized the irrelevant evidence by reading from the handwritten letters during its opening statement and closing argument. 1 RP 254-255; 2 RP 390, 407-409. Without the irrelevant evidence the result of the trial would have been different.

Moreover, defense counsel did not make a tactical decision by failing to object to the admission of the handwritten letters and the March 19 incident. *See Grier*, 171 Wn.2d at 33; *Sexsmith*, 138 Wn. App. at 509. Defense counsel's failure to object to this irrelevant evidence was not based on reasonable decision-making. *In re Hubert*, 138 Wn. App. at 928. In its closing argument defense counsel acknowledged the letters "are not evidence of premeditation for killing [Mr.] Palmer." 2 RP 419-420. Based on this acknowledgment, there was no tactical reason for defense counsel's failure to object to this irrelevant prejudicial evidence.

In summation, Mr. Scantling has met the two-prong test for ineffective assistance of counsel. Defense counsel's failure to object to the admission of the handwritten letters and the evidence of March 19, 2013, constituted deficient performance and Mr. Scantling was prejudiced by that deficient performance. Therefore, the convictions should be reversed.

4. The prosecutor committed misconduct in opening and closing arguments by improperly appealing to the jury's passions and prejudices, and by stating his personal belief about the credibility of a witness.

"To prevail on a claim of prosecutorial misconduct, the defendant must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal quotation marks omitted) (*quoting State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). A defendant claiming prosecutorial misconduct who has preserved the issues by objection bears the burden of establishing the impropriety of the prosecuting attorney's actions and their prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). To establish prejudice, the defendant must prove "there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." *Thorgerson*, at 442-43 (alteration in original) (internal quotation marks omitted) (quoting *Magers*, 164 Wn.2d at 191).

If the defendant fails to properly object to the misconduct, "a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered." *State v.*

O'Donnell, 142 Wn. App. 314, 328, 174 P.3d 1205 (2007) (internal quotation marks omitted) (*quoting State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)).

a. The prosecutor committed misconduct in opening and closing arguments by improperly appealing to the jury's passions and prejudices.

"Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant." *Fisher*, 165 Wn.2d at 746 (*citing State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)). "[B]ald appeals to passion and prejudice constitute misconduct." *Id*. at 747 (citing *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)). "Although reference to the heinous nature of a crime and its effect on the victim can be proper argument, the prosecutor's duty is to ensure a verdict free of prejudice and based on reason." *State v. Claflin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984) (internal citations omitted) (citing *State v. Huson*, 73 Wn.2d 660, 662, 440 P.2d 192 (1968)). A prosecutor may not urge a jury to convict based upon an appeal to the jury's sympathy for the victim. *See id*. at 849-51.

Here, in his opening and closing arguments the prosecutor told the jury the purpose of the trial was to seek justice for Palmer and for the community. 1 RP 255, 2 RP 410. Arguing that a victim and the

community as a whole deserved justice was misconduct because it improperly appealed to the jury's passions and prejudices. *See Fisher*, 165 Wn.2d at 747 (citing *Belgarde*, 110 Wn.2d at 507-08); *Claflin*, 38 Wn. App. at 849-51.

The prosecutor also committed misconduct in his closing argument by referring to pictures of Palmer as "sad, gruesome pictures[,]" and by asking the jury "[w]hat message is [Mr. Scantling] giving his kids?" 2 RP 396, 406. Both statements improperly appealed to the jury's passions and prejudices. *See Fisher*, 165 Wn.2d at 747 (citing *Belgarde*, 110 Wn.2d at 507-08)

The prosecutor's improper argument was prejudicial since there was a substantial likelihood that the remarks affected the jury's verdict. *See Thorgerson*, 172 Wn.2d at 442-43 (quoting *Magers*, 164 Wn.2d at 191). The evidence that Mr. Scantling acted with premeditated intent to cause the death of another person was not overwhelming. The facts of the case emphasized by the prosecutor were likely to evoke a passionate sympathetic response for the alleged victim. Under these circumstances there was a substantial likelihood that the jury verdict was based on emotions evoked by the prosecutor's references to the alleged victim and the community rather than an impartial evaluation of the credibility of the witness' testimony and the evidence presented. By referencing evidence

as "sad, gruesome pictures" and asking the jury "[w]hat message is [Mr. Scantling] giving his kids," the prosecutor improperly influenced the jury. 2 RP 396, 406.

This misconduct "'was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.'"[4] *O'Donnell*, 142 Wn. App. at 328 (*quoting Munguia*, 107 Wn. App. at 336). The State's challenged arguments were flagrantly improper and prejudicial. Mr. Scantling's convictions should be reversed and remanded for a new trial.

b. The prosecutor committed misconduct in closing argument by improperly by stating his personal belief about the credibility of a witness.

Improper vouching for a witness' credibility occurs "if a prosecutor expresses his or her personal belief as to the veracity of the witness . . . ." *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). "It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness." *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d

[4] Because Mr. Scantling objected to the State asking the jury "[w]hat message is [Mr. Scantling] giving his kids[,]" this argument is not subject to this heightened standard of review. 2 RP 406; *see also State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). This argument was prejudicial to Mr. Scantling. *See State v. Thorgerson*, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011) (internal quotation marks omitted) (*quoting State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

940 (2008); *see also State v. Dhaliwal*, 150 Wn.2d 559, 577-78, 79 P.3d 432 (2003). A prosecutor improperly vouches for the credibility of a witness by arguing that a witness is telling the truth. *State v. Ramos*, 164 Wn. App. 327, 341 n.4, 263 P.3d 1268 (2011) (finding the prosecutor improperly vouched for the credibility of witnesses by arguing they "were just telling you what they saw and they are not being anything less than 100 percent candid.").

Here, the prosecutor committed misconduct by stating his personal belief as to the credibility of Krebs' son. 2 RP 404; *see also Warren*, 165 Wn.2d at 30; *Dhaliwal*, 150 Wn.2d at 577-78. He improperly vouched for the credibility of this witness by arguing "[Krebs' son] was not on that stand lying." 2 RP 404.

The prosecutor's improper argument was prejudicial, as there was a substantial likelihood that the remark affected the jury's verdict. *See Thorgerson*, 172 Wn.2d at 442-43 (quoting *Magers*, 164 Wn.2d at 191). The evidence that Mr. Scantling acted with premeditated intent to cause the death of another person was not overwhelming. By improperly vouching for the credibility of an eyewitness, the prosecutor interfered with the jury's responsibility to evaluate the credibility of this witness. The misconduct "'was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.'"

O'Donnell, 142 Wn. App. at 328 (*quoting Munguia*, 107 Wn. App. at 336). For these reasons Mr. Scantling's convictions should be reversed and remanded for a new trial.

5. The directive to pay Legal Financial Obligations based on an unsupported finding of ability to pay, and the discretionary costs imposed without compliance with RCW 10.01.160, should be stricken from the Judgment and Sentence.

Although Mr. Scantling did not make these arguments below, illegal or erroneous sentences may be challenged for the first time on appeal.[5] *See State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *see also State v. Bertrand*, 165 Wn. App. 393, 398, 403-05, 267 P.3d 511 (2011) (considering the defendant's challenge to the trial court's imposition of LFOs for the first time on appeal); *State v. Bower*, 64 Wn. App. 808, 810, 827 P.2d 308 (1992) (also considering the challenge for the first time on appeal); *cf. State v. Blazina*, 174 Wn. App. 906, 911-12, 301

[5] Mr. Scantling is aware that this Court recently issued an opinion holding that this issue may not be challenged for the first time on appeal. *See State v. Duncan*, No. 29916-3-III, 2014 WL 1225910, at *2-6 (Wash. Ct. App. March 25, 2014). However, whether this issue can be raised for the first time on appeal is now pending before the Washington Supreme Court in *State v. Blazina*, No. 89028-5, consolidated with *State v. Paige-Colter*, No. 89109-5. The cases were scheduled for oral argument February 11, 2014. Therefore, Mr. Scantling raises this issue in order to preserve his argument, should the Washington Supreme Court overrule this Court's opinion in *Duncan*.

P.3d 492, *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013) (declining to consider the challenge for the first time on appeal); *State v. Calvin*, 316 P.3d 496, 508 (Wash. Ct. App. 2013) (declining to consider the challenge for the first time on appeal); *State v. Quintanilla*, 178 Wn. App. 173, 313 P.3d 493, 497 (2013) (acknowledging *State v. Blazina*, but also discussing the merits of the LFO issue raised by the defendant).

a. The directive to pay must be stricken. There is insufficient evidence to support the trial court's implied finding that Mr. Scantling has the present and future ability to pay legal financial obligations, and the directive to pay must be stricken from the Judgment and Sentence.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by

the state in prosecuting the defendant . . . ." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). "In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

In *Curry*, our Supreme Court concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, the *Curry* court recognized that both RCW 10.01.160 and the federal constitution require consideration of the ability to pay. *Id*. at 915-16.

Here, there is insufficient evidence to support the trial court's implied finding that Mr. Scantling has the present and future ability to pay legal financial obligations. CP 149. The trial court considered Mr. Scantling's "past, present and future ability to pay legal financial obligations" but it made no express finding that Mr. Scantling had the present or future ablity to pay those LFOs. CP 149. The finding, however, is implied because the court ultimately ordered Mr. Scantling to

make monthly payments of up to $50.00, while in the custody of the Department of Corrections. CP 151.

Whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "'as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.'" *Bertrand*, 165 Wn. App. at 404 n.13 (quoting *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden' imposed by LFOs under the clearly erroneous standard." *Bertrand*, 165 Wn. App. at 404 (quoting *Baldwin,* 63 Wn. App. at 312) (internal citation omitted). A finding that is unsupported in the record must be stricken. *Bertrand*, 165 Wn. App. at 405.

Here, the record does not show that the trial court took into account Mr. Scantling's financial resources and the nature of the burden of

imposing LFOs on him. The record contains no evidence to support the trial court's implied finding that he has the present or future ability to pay LFOs. To the contrary, the trial court found him indigent for purposes of pursuing this appeal. *See* Order of Indigency on file. The implied finding that Mr. Scantling has the present or future ability to pay LFOs that is implicit in the directive to make monthly payments of up to $50.00 while in the custody of the Department of Corrections is simply not supported in the record. The finding is clearly erroneous and the directive to make monthly payments must be stricken from the Judgment and Sentence. *See Bertrand*, 165 Wn. App. at 405 (reversing the trial court's finding of the defendant's ability to pay LFOs, and stating that this reversal "forecloses the ability of the Department of Corrections to begin collecting LFOs from [the defendant] until after a future determination of her ability to pay.").

b. The imposition of discretionary costs of $24,967.73 must also be stricken. Because the record does not reveal that the trial court took Mr. Scantling's financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160, the imposition of discretionary costs must be stricken from the Judgment and Sentence.

A court's determination as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. *Baldwin,* 63 Wn. App. at 312. The decision to

impose discretionary costs requires the trial court to balance the defendant's ability to pay against the burden of his obligation. *Id*. This is a judgment which requires discretion and should be reviewed for an abuse of discretion. *Id.*

The trial court may order a defendant to pay discretionary costs pursuant to RCW 10.01.160. However:

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

RCW 10.01.160(3).

It is well-established that this statutory provision does not require the trial court to enter formal, specific findings. *See Curry*, 118 Wn.2d at 916. But, in the absence of a specific finding, there must still be evidence in the record to show compliance with RCW 10.01.160(3).

Here, the court ordered Mr. Scantling to pay discretionary costs of $24,967.73, and mandatory costs of $6,036, for a total Legal Financial Obligation (LFO) of $31,003.73. CP 150, 156; RP (Sept. 19, 2013) 5-6.

After considering Mr. Scantling's "past, present and future ability to pay legal financial obligations" (in boilerplate language), the court imposed discretionary costs of $24,967.73. CP 149, 150, 156; RP (Sept. 19, 2013) 5-6. At a minimum, the imposition of discretionary costs

represents an implied finding that Mr. Scantling is or will be able to pay them. However, the record reveals no balancing by the court through inquiry into Mr. Scantling's financial resources and the nature of the burden that payment of LFOs would impose on him. RP (Sept. 19, 2013) 2-7.

The trial court's imposition of discretionary costs without compliance with the balancing requirements of RCW 10.01.160(3) is an abuse of discretion. *See Baldwin,* 63 Wn. App. at 312 (stating this standard of review).

The remedy is to strike the directive to pay monthly payments of up to $50.00, while in the custody of the Department of Corrections, and the imposition of the discretionary costs of $24,967.73. *See Bertrand*, 165 Wn. App. at 405.

D. CONCLUSION

For the reasons stated the convictions should be reversed.

The matter should also be remanded to strike the implied finding of present and future ability to pay Legal Financial Obligations by removing the directive to make monthly payments, and to strike the imposition of discretionary costs from the Judgment and Sentence.

Respectfully submitted on March 31, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on March 31, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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