No. 45774-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Vincent Fowler,

Appellant.

Kitsap County Superior Court Cause No. 13-1-00466-4

The Honorable Judge Anna Laurie

Appellant's Opening Brief

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ISSUE 2: A "missing witness" instruction is only appropriate when the uncalled witness is particularly available to one party. Here, the court instructed the jury on the doctrine even though the prosecutor's office had the witness's name and contact information. Did the court's "missing witness" instruction violate Mr. Fowler's right to due process?

ISSUE 3: A court may only give a "missing witness" instruction if it would not violate the constitutional rights of an accused person. Here, the court gave the instruction in a manner that shifted the burden of proof and undermined the presumption of Mr. Fowler's innocence. Did the instruction violate Mr. Fowler's right to due process?

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11. The court's "no corroboration necessary" instruction improperly commented on the evidence, in violation of Wash. Const. art. IV, § 16.

12. The corroboration instruction impermissibly conveyed the judge's opinion regarding the weight of the alleged victims' testimony.

13. The court erred by giving Instruction number 8.

> **ISSUE 6:** Art. IV, § 16 constrains a judge from commenting on a witness's credibility or the significance of any witness's testimony. Here, the court instructed the jury that the testimony of the alleged victims, in particular, did not need to be corroborated. Was the corroboration instruction an impermissible judicial comment on the evidence?

14. The court erred by entering finding 4.1 on Mr. Fowler's Judgment and Sentence.

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16. The imposition of attorney fees without any evidence that Mr. Fowler has the present or future ability to pay violated his Sixth and Fourteenth Amendment right to counsel.

ISSUE 7: A trial court may only impose attorney fees upon finding that the offender has the present or likely future ability to pay. Here, the court imposed $1135 in attorney fees without inquiring into whether Mr. Fowler had the ability to pay them. Did the trial court violate Mr. Fowler's Sixth and Fourteenth Amendment right to counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Vincent Fowler met the mother of eight-year-old A.C.G. and ten-year-old A.G. through a friend. RP (trial) 188. The girls' family was homeless, so Mr. Fowler occasionally helped them with food money, rides, childcare, and places to stay. RP (trial) 108, 191, 201-02. As a result, Mr. Fowler slept in the same home as the girls on a few occasions. RP (trial) 192-97, 203-05, 210-11.

After one such occasion, A.G. accused Mr. Fowler of touching her inappropriately. RP (trial) 197-98. Mr. Fowler called A.G.'s mother to inform her of the accusation and suggested that they call the police. RP (trial) 199. No action was taken. RP (trial) 201. A.G. continued to turn to Mr. Fowler for rides to the store and to the roller-skating rink. RP (trial) 109-10. A.G. never claimed that Mr. Fowler touched her during any of their subsequent interactions. RP (trial) 113. Eventually, Mr. Fowler lost contact with the family. RP (trial) 211.

Over a year later, A.C.G. took part in a forensic interview related to charges that her older brother had raped her. RP (9/26/13) 40. During the interview, A.C.G. said for the first time that Mr. Fowler had also touched her inappropriately on two occasions. RP (9/26/13) 40-41.

The state charged Mr. Fowler with two counts of child molestation in the first degree and one count of rape of a child in the first degree. CP 17-20.

At trial, Mr. Fowler recounted the events of the night when A.G. claimed he had molested her. RP (trial) 192-97. He testified that his roommate's dog had jumped on A.G. and awakened her while she slept on the couch. RP (trial) 195-96. After this occurred, he asked his roommate, Monica Boyle, to keep the dog confined to an area away from the living room. RP (trial) 195.

After both sides had rested, the state asked for a "missing witness instruction" regarding Boyle. RP (trial) 226. Mr. Fowler objected.

Defense counsel argued that the missing witness doctrine did not apply because Boyle's testimony would not be material and she was not particularly available to him. RP (trial) 230-33, 240. He pointed out that the prosecution had known Boyle's name from the police investigation. RP (trial) 239-40. He also explained that she had moved from the home more than two years earlier, and he did not know how to contact her. RP (trial) 237-38.

Over Mr. Fowler's objection, the court gave the following instruction to the jury:

> If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:
> (1) The witness is within the control of, or peculiarly available to, that party;
> (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
> (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
> (4) There is no satisfactory explanation of why the party did not call the person as a witness; and
> (5) The inference is reasonable in light of all the circumstances.
> The parties in this case are the State of Washington and Vincent L. Fowler.
> CP 46.

The court also instructed the jury that the alleged victims' testimony did not require corroboration:

> In order to convict a person of Child Molestation in the First Degree and/or Rape of a Child in the First Degree it is not necessary that the testimony of the alleged victim be corroborated.
> CP 45.

In closing, the prosecutor argued that the jury could infer that Mr. Fowler did not call his former roommate because she would have contradicted his version of events. RP (trial) 270-71.

The jury convicted Mr. Fowler of all three charges. RP (trial) 296. The court ordered him to pay $1135 in fees for his court-appointed attorney. CP 99.

This timely appeal follows. CP 109.

ARGUMENT

I. THE COURT'S MISSING WITNESS INSTRUCTION VIOLATED DUE PROCESS BY SHIFTING THE BURDEN OF PROOF ONTO MR. FOWLER AND ENCOURAGING THE JURY TO MAKE AN UNRELIABLE INFERENCE OF HIS GUILT.

A. Standard of Review.

Whether a court erred by giving an unwarranted missing witness instruction is reviewed *de novo*. *State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008). Constitutional issues are also reviewed *de novo*. *Dellen Wood Products, Inc. v. Washington State Dep't of Labor & Indus.*, 179 Wn. App. 601, 626, 319 P.3d 847 (2014).

B. The missing witness doctrine does not apply to Mr. Fowler's case.

Criminal defendants have a constitutional right to be presumed innocent and to have the government prove guilt beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Because of this, due process limits use of the 'missing witness' doctrine in criminal cases. *Montgomery*, 163 Wn.2d at 183. A court risks shifting the burden of proof by instructing the jury that it may draw a negative inference from an accused person's failure to produce evidence. *State v. Dixon*, 150 Wn. App. 46, 56, 207 P.3d 459 (2009).

The missing witness doctrine applies only if (1) the potential testimony is material and not cumulative, (2) the missing witness is particularly under the control of the party against whom the instruction is offered, (3) the witness's absence is not satisfactorily explained, and (4) the argument does not shift the burden of proof. *Montgomery*, 163 Wn.2d at 598-599. These limitations are "particularly important" when the missing witness doctrine is applied against an accused person. *Id.* at 598.

The missing witness rule only applies when "it is clear the defendant was able to produce the witness." *Dixon*, 150 Wn. App. at 55. The testimony of the accused must also "unequivocally impl[y] the uncalled witness's ability to corroborate his theory of the case." *Id.*

An erroneous missing witness instruction is not harmless when the parties to a criminal case present the jury with two competing versions of events. *Montgomery*, 163 Wn.2d at 600. This is particularly true when the prosecutor argues about the missing witness in closing. *Id.*

The missing witness rule does not apply to Mr. Fowler's case because elements (1), (2), and (4) are met. *Montgomery*, 163 Wn.2d at 598-599.

First, the Boyle's potential testimony was not material to Mr. Fowler's case. *Id.* At most, Boyle could have corroborated an insignificant detail of Mr. Fowler's version of events: that her dog went

into the living room while A.G. was sleeping. RP (trial) 195-96. A.G. had already testified that the dog was in the apartment. RP (trial) 100. Further, the dog's presence did nothing to corroborate either Mr. Fowler's testimony (that he never touched A.G.) or A.G.'s testimony (that he did). The missing witness rule does not apply to Mr. Fowler's case because Boyle's testimony would not have been material. *Id.* at 598.

Second, Boyle was not under Mr. Fowler's control. *Id.* at 598. A.G. mentioned Mr. Fowler's roommate during her interview at the prosecutor's office. RP (trial) 239. The officers got Boyle's name from the manager of the apartment complex. RP (trial) 238. The apartment manager – who was a witness for the state – had a forwarding address for Boyle. RP (trial) 178-84; 256. Boyle was equally available to Mr. Fowler and to the prosecution.

Finally, the missing witness instruction violated Mr. Fowler's constitutional rights by shifting the burden of proof. *Id.* at 599. Mr. Fowler had no burden to present evidence in his defense. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). But the court's instruction encouraged the jury to question his credibility because he failed to call a witness who might possibly have corroborated one detail of his testimony. The missing witness instruction violated the presumption of Mr. Fowler's innocence.

Mr. Fowler was prejudiced by the erroneous missing witness instruction. *Montgomery*, 163 Wn.2d at 600. The case was a credibility contest between Mr. Fowler and the alleged victims. The effect of the instruction was to inform the jury that Mr. Fowler's story was not credible unless it was corroborated. The court also instructed the jury that A.G. and A.C.G.'s testimony did not need to be corroborated.[1] CP 45. The combined effect of these instructions was to advise the jury that the alleged victims were more credible than Mr. Fowler as a matter of law.

The court erred by giving a prejudicial missing witness instruction that was not warranted by the facts of this case. *Montgomery*, 163 Wn.2d at 598-99. Mr. Fowler's convictions must be reversed. *Id.* at 601.

C. The missing witness doctrine violates due process when applied against an accused person in a criminal trial because it permits jurors to infer facts that are not rationally related to the witness's absence.

Due process requires the state to prove each element of a criminal offense beyond a reasonable doubt. *Winship*, 397 U.S. 358. The accused has no burden to present any evidence in his/her defense. *See Mullaney v. Wilbur,* 421 U.S. 684, 703, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). Due process does not permit a court to instruct a jury on a factual inference if

[1] As argued below, this instruction constituted an impermissible judicial comment on the evidence.

there is "no rational connection between the facts proved and the ultimate fact presumed." *Leary v. United States*, 395 U.S. 6, 33, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969) (*quoting Tot v. United States*, 319 U.S. 463, 467, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943)).[2] A court may not instruct jurors on a factual inference if more than one reasonable conclusion could be drawn from the facts proved. *State v. Jackson*, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989).

The "missing witness" doctrine is a legal anachronism permitting courts to penalize a party for failure to call a witness, based on antiquated legal considerations. *See Herbert v. Wal-Mart Stores, Inc.,* 911 F.2d 1044, 1046 (5th Cir. 1990). No Washington court has analyzed the historical context of the doctrine and whether its logic still applies in the modern legal landscape.[3,4] When applied against an accused person in a criminal

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[2] The *Tot* rule applies to permissive inferences as well as mandatory presumptions. *Jackson*, 112 Wn.2d at 876.

[3] Courts in other jurisdictions have noted the constitutional concerns raised by application of the "missing witness" rule against an accused person. *See e.g. State v. Tahair*, 172 Vt. 101, 109, 772 A.2d 1079 (2001); *State v. Malave*, 250 Conn. 722, 737, 737 A.2d 442 (1999); *Ross v. State*, 106 Nev. 924, 927, 803 P.2d 1104 (1990); *State v. Brewer*, 505 A.2d 774, 777 (Me. 1985); *Russell v. Com.*, 216 Va. 833, 836, 223 S.E.2d 877 (1976) (instruction could "weaken, if not neutralize, the presumption of innocence"); *State v. Caron*, 300 Minn. 123, 126, 218 N.W.2d 197 (1974) *abrogated on other grounds by State v. Ramey*, 721 N.W.2d 294 (Minn. 2006).

[4] In 1991, the Supreme Court held that a prosecutor had not committed flagrant and ill-intentioned misconduct by arguing the "missing witness" inference in closing argument. *State v. Blair*, 117 Wn.2d 479, 488, 816 P.2d 718 (1991). The court relied in part on the fact that the court also instructed the jury that the attorneys' remarks are not evidence. *Id.*
(Continued)

case, the inference violates due process because it undermines the presumption of innocence and has no rational connection to the facts actually proved. *Leary*, 395 U.S. at 33.

The often-cited source for the "missing witness" rule in the U.S. is dictum from the U.S. Supreme court. *Graves v. United States*, 150 U.S. 118, 14 S.Ct. 40, 37 L.Ed. 1021 (1893). But the rule was actually created in eighteenth century England to serve two purposes. *Herbert,* 911 F.2d at 1046.

First, it acted as a counterbalance to the common law "voucher rule," which prohibited a party from impeaching its own witness. *Id.* The voucher rule discouraged parties from calling potentially hostile witnesses, because such witnesses could not be impeached if their testimony varied from the expected script. Thus a party would never call a witness more closely associated with the opposing side. *Id.* Without the "missing witness" rule as a counterbalance, the voucher rule would have permitted a party to skew the evidence at trial by simply failing to call certain witnesses. *Id.* Each party would have known that the opposing party would not risk calling a hostile witness who could not be impeached. *Id.*

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at 492. The *Blair* court did not deal with the propriety of a court instructing the jurors regarding the "missing witness" inference. *Id.* It also did not address the due process issues Mr. Fowler raises. *Id.* Mr. Fowler does not argue that the prosecutor committed misconduct in this case. *Blair* does not control here.

With the voucher rule in place, the missing witness doctrine rested on a logical inference. A party's failure to call and "vouch for" a witness suggested that the party feared that the witness's testimony would be unfavorable.[5] *Brewer,* 505 A.2d at 776.

Second, it discouraged the parties from concealing evidence. *Id.* Courts created the missing witness doctrine "to punish the party [who had concealed evidence] by depriving him of any benefit he might thus have gained." *Id.*

In short, the "missing witness" doctrine was created to penalize a party's attempts to conceal evidence and to overcome the incentives created by the voucher rule. It was not created as a reliable fact-finding tool. *Herbert,* 911 F.2d at 1046. It has no place in modern criminal proceedings.

The voucher rule no longer exists in Washington. ER 607. A party may call an adverse witness, control the testimony with leading questions, and impeach the witness when necessary. ER 607; ER 611(b). Furthermore, a party's attempts to conceal evidence can be punished through discovery sanctions and criminal prosecution. *See* CR 37; CrR 4.7(h); RCW 9A.72.150.

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[5] Additionally, before the advent of discovery procedures, the "missing witness" rule was used as a way to compel parties to identify potential witnesses. *Tahair*, 172 Vt. at 107.
(Continued)

Defense counsel may have a number of strategic reasons not to call a witness, none of which are related to whether the witness's testimony would be favorable to the defense. *See e.g. In re Elmore*, 162 Wn.2d 236, 266, 172 P.3d 335 (2007) (failure to call a witness is reasonable when it could have opened the door to damaging rebuttal evidence); *United States v. Lathrop*, 634 F.3d 931, 939 (7th Cir. 2011) (failure to call a witness is reasonable based on counsel's assessment of the witness's demeanor and fear that the witness would "fall apart" during cross examination); *Pina v. Maloney*, 565 F.3d 48, 56 (1st Cir. 2009) (it is reasonable not to call a witness who is clearly biased in favor of the defense); *State v. James*, 48 Wn. App. 353, 360, 739 P.2d 1161 (1987) (failure to call an impeachable witness is reasonable). These strategic considerations further undermine the logic of the "missing witness" doctrine's inference that the only reason a party may fail to call a witness is because his/her testimony would be harmful. *Tahair*, 172 Vt. at 108; *Malave*, 250 Conn. at 734-35.

The "missing witness" doctrine is a vestigial remnant that no longer serves any evidentiary purpose. Given the doctrine's undermining effect on the presumption of innocence, its application against an accused person in a criminal trial violates due process. *Mullaney,* 421 U.S. at 703.

Modern discovery rules also undercut the "missing witness" doctrine's utility. *Tahair*, 172 Vt. at 107; *See also* ER 4.7.

The "missing witness" doctrine also violates due process because the inference (that a witness's testimony would be damaging) has no rational relationship to the facts adduced at trial (that a party did not call the witness to testify). *Leary*, 395 U.S. at 33. The party's failure to call a witness is just as likely to have been based on other strategic factors. Because a witness's absence has more than one reasonable explanation, the inference that it points to unfavorable testimony violates due process. *Jackson*, 112 Wn.2d at 876.

Constitutional error requires reversal unless the state can prove that it was harmless beyond a reasonable doubt. *State v. Lamar*, --- Wn.2d ---, 327 P.3d 46, 52 (June 12, 2014). The state cannot prove that this constitutional error was harmless beyond a reasonable doubt. . *Lamar*, 327 P.3d at 52. As outlined above, the court's "missing witness" instruction and its "no corroboration necessary" instruction worked in combination to inform jurors that Mr. Fowler's theory of the case required substantiation, but that the state's did not. Mr. Fowler was prejudiced by the court's improper instruction.

The court violated Mr. Fowler's right to due process by instructing the jury that it could infer that Boyle's testimony would have been damaging to the defense, based on the unrelated fact that Mr. Fowler did

not call her to testify. *Jackson*, 112 Wn.2d at 876. Mr. Fowler's convictions must be reversed. *Id.* at 879.

II. THE COURT'S INSTRUCTIONS INCLUDED JUDICIAL COMMENTS ON THE EVIDENCE.

A. Standard of Review.

Courts review *de novo* allegations of constitutional error. *Dellen Wood Products,* 179 Wn. App. at 626. A manifest error affecting a constitutional right can be raised for the first time on appeal. RAP 2.5(a)(3).

Jury instructions are reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Instructions must make the relevant standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

Courts presume prejudice when a judge comments on the evidence. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). To overcome this presumption, the record must affirmatively show that no prejudice could have resulted. *Levy*, 156 Wn.2d at 725. This is a higher standard than that normally applied to constitutional errors. *Id.*

B. Washington's constitution prohibits judicial comments on the evidence.

Under art. IV, § 16 of the Washington Constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Art. IV, § 16. A comment on the evidence "invades a fundamental right" and may be challenged for the first time on review under RAP 2.5(a)(3). *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

The judicial comment need not expressly convey the court's feelings regarding the evidence. *Levy*, 156 Wn.2d at 721. A judge violates the constitutional prohibition by making implied comments as well. *Id.* A statement qualifies as a judicial comment if the jury can infer the court's attitude. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); *accord State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

A court comments on the evidence by instructing the jury regarding the weight to give to certain evidence. *In re Det. of R.W.*, 98 Wn. App. 140, 144, 988 P.2d 1034 (1999) (*citing Lane*, 125 Wn.2d at 838).

1. The court's missing witness instruction improperly commented on the evidence.

Here, the court instructed the jury that it could infer that the "missing witness" testimony would have been unfavorable to Mr. Fowler.

CP 46. This instruction was an impermissible judicial comment on the evidence. *Levy*, 156 Wn.2d at 721. The instruction conveyed the court's attitude that the evidence – or lack of evidence – would have incriminated Mr. Fowler. *Lane*, 125 Wn.2d at 838.

Even if the missing witness doctrine does not violate due process when applied to an accused person, the court should not instruct on the missing witness inference. As the U.S. Supreme Court has noted in the Fifth Amendment context:

> What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

Griffin v. California, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).[6] Similarly, by giving a missing witness instruction, a court "solemnizes" an accused person's failure to call a witness into "evidence against him[/her]." *Id.*

No published Washington case has considered whether the missing witness instruction constitutes a judicial comment on the evidence. Accordingly, this court can look to persuasive authority from other states for guidance. *Dellen Wood Products*, 179 Wn. App. at 617 n. 20.

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[6] *Griffith* dealt with an instruction permitting a negative inference based on an accused person's failure to testify. *Griffith*, 380 U.S. at 614.

Numerous other jurisdictions have found that an instruction on the inference is improper, even if a prosecutor can permissibly argue the missing witness rule to the jury. *See e.g Tahair*, 172 Vt. at 109; *Malave*, 250 Conn. at 738-40; *Henderson v. State*, 367 So.2d 1366, 1367 (Miss. 1979); *State v. Hammond*, 270 S.C. 347, 356, 242 S.E.2d 411 (1978); *Russell*, 216 Va. at 835-36. This is because the instruction "creates evidence from nonevidence, [and] may add fictitious weight to one side of the case… by giving the missing witness undeserved significance." *Tahair*, 172 Vt. at 109 (internal citation omitted).

Although these persuasive authorities do not construe art. IV, § 16, their rationale applies with equal force. Even if the missing witness inference can be permissible attorney argument, an instruction on the rule "creates evidence from nonevidence." *Id.* The instruction "add[s] fictitious weight" to one party's case by conveying the court's opinion on the credibility of the evidence. *Id.* When coming from the court, such a charge constitutes an unconstitutional judicial comment on the evidence. *R.W.*, 98 Wn. App. at 144.

The state cannot overcome the presumption that Mr. Fowler was prejudiced by the court's improper comment. *Levy*, 156 Wn.2d at 725. The instruction permitted the jury to draw a negative inference from Mr. Fowler's failure to call Boyle, who might have corroborated a small

portion of his testimony. The court also instructed the jury that the alleged victim's version of events did not need to be corroborated. CP 45. The combined effect of these instructions was to inform the jury that the state's case did not require substantiation, but that Mr. Fowler's did. Mr. Fowler was prejudiced by the court's improper comment on the evidence. *Id.*

The court commented on the evidence in Mr. Fowler's case in violation of art. IV, § 16 of the state constitution. Mr. Fowler's convictions must be reversed. *Levy*, 156 Wn.2d at 721.

2. The court's "no corroboration necessary" instruction improperly commented on the evidence.

Likewise, the instruction that the alleged victims' testimony did not need to be corroborated was an impermissible judicial comment on the evidence. CP 45; *R.W.*, 98 Wn. App. at 144.

An instruction conveying the court's opinion regarding the "worth" of a witness's testimony constitutes an impermissible comment on the evidence. *State v. Mellis*, 2 Wn. App. 859, 862, 470 P.2d 558 (1970). This is so whether the opinion is explicit or implied. *Id.*

There is no pattern jury instruction corresponding to the instruction given in Mr. Fowler's case.[7] *See* WPIC 45.02. In fact, the instruction

[7] To support this instruction, the state's proposed instructions cited not to any WPIC but to the rape shield statute at RCW 9A.44.020. The rape shield statute addresses admissibility of (Continued)

committee indicates that the issue of corroboration is really "a factual problem, not a legal problem" because it is simply an issue of sufficiency of the evidence. Comment to WPIC 45.02. Accordingly, "whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel." *Id.*

In 1949, the state Supreme Court upheld the following jury instruction:

> You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

State v. Clayton, 32 Wn.2d 571, 572, 202 P.2d 922 (1949). The court relied heavily on the ameliorative effect of the second sentence in the instruction. *Id.* at 577. The second sentence informed the jury that guilt or innocence was determined based on independent analysis of all of the evidence in the case. *Id.* It also qualified the first sentence as one that merely placed the alleged victim's testimony on equal footing with that of

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evidence, not the weight the jury should lend testimony at trial. The rape shield statute is irrelevant to whether the court's instruction was proper in Mr. Fowler's case.

any other witness, rather than one singling her testimony out as particularly credible.[8]

More recently, the Court of Appeals emphasized the critical nature of the second sentence in the *Clayton* instruction. *State v. Johnson,* 152 Wn. App. 924, 219 P.3d 958 (2009). The *Johnson* court affirmed that the corroboration instruction could become a comment on the evidence if given without the second sentence. *Id.*[9]

Here, the court did not provide the kind of qualification provided by the second sentence in the *Clayton* corroboration instruction. CP 45. The effect was to single out the girls' testimony as particularly reliable. Rather than instructing the jury that any witness's testimony could be believed without corroboration, the court implied that the alleged victims' statements carried special weight. Such an implication violates art. IV, § 16. *R.W.*, 98 Wn. App. at 144.

The trial court made a judicial comment on the evidence by instructing the jury that the alleged victims' testimony, alone, did not

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[8] The 1949 instruction made clear that an older common law rule (requiring corroboration of the alleged victim's testimony in sexual assault cases) no longer applied. *See Clayton*, 32 Wn.2d at 572-73 (citing *State v. Morden*, 87 Wash. 465, 467, 151 P. 832 (1915)).

[9] The court of appeals has also noted that it shares the WPIC committee's "misgivings" about an instruction like the one given in Mr. Fowler's case. *State v. Zimmerman*, 130 Wn. App. 170, 121 P.3d 1216 (2005). Nonetheless, the *Zimmerman* court upheld the instruction because it was bound by the Supreme Court's decision in *Clayton*. *Id.* at 182-83. The issue of whether the second sentence in the *Clayton* instruction changed the analysis was not before the court in *Zimmerman*. *Johnson*, 152 Wn. App. at. 935.

require corroboration. *Levy*, 156 Wn.2d at 721. Mr. Fowler's convictions must be reversed. *Id.*

III. THE COURT VIOLATED MR. FOWLER'S SIXTH AMENDMENT RIGHT TO COUNSEL BY IMPOSING ATTORNEY'S FEES IN A MANNER THAT IMPERMISSIBLY CHILLS THE EXERCISE OF THAT RIGHT.

A. Standard of Review.

Reviewing courts assess questions of law and constitutional challenges *de novo*. *Dellen Wood Products,* 179 Wn. App. at 626.

B. Erroneously-imposed legal financial obligations (LFOs) may be challenged for the first time on appeal.

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).[10] A court exceeds its authority by ordering an offender to pay legal financial obligations (LFOs) beyond what the legislature has authorized. RCW 9.94A.760.

Although most issues may not be raised absent objection in the trial court, illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford,* 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *see also, State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008)

[10] *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).

(erroneous condition of community custody could be challenged for the first time on appeal). An offender may challenge imposition of a criminal penalty for the first time on appeal if the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).[11]

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699 (2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted,* 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenged to LFOs. *Id.* Those cases do not govern Mr. Fowler's claim that the court lacked constitutional and statutory authority.

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[11] *See also, State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining "sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding "challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has "established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal").

C. The court violated Mr. Fowler's right to counsel by ordering him to pay the cost of her court-appointed attorney without inquiring into his 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). 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* 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) (emphasis added).

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.[12] *Fuller*, 417 U.S. at 45.

In *Fuller*, 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 for whom repayment would work 'manifest hardship' are forever exempt

[12] 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
(Continued)

from any obligation to repay". *Fuller*, 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*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to require a finding of ability to pay before ordering an offender to reimburse for the cost of counsel. *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

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obligation requires disclosure before counsel is appointed.

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").

Washington courts have erroneously interpreted *Fuller* 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 *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

Here, neither party provided the court with information about Mr. Fowler's present or likely future ability to pay attorney's fees. RP (1/10/14). Although the Judgment and Sentence includes a boilerplate finding that "the Defendant has the ability or likely future ability to pay," this finding is not supported by anything in the record. CP 99. Indeed, the court found Mr. Fowler indigent at beginning and at the end of the proceedings. CP 110-12. Mr. Fowler's felony convictions and lengthy incarceration will also negatively impact his prospects for employment.

The lower court ordered Mr. Fowler to pay $1135 in attorney fees without conducting any inquiry into his present or future ability to pay. This violated his right to counsel. Under *Fuller,* the court lacked authority to order payment for the cost of court-appointed counsel without first

determining whether he had the ability to do so. *Fuller*, 417 U.S. at 53. The order requiring Mr. Fowler to pay $1135 in attorney fees must be vacated. *Id*

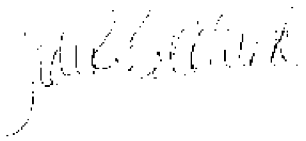
CONCLUSION

The court violated Mr. Fowler's right to due process and commented on the evidence by giving a "missing witness" instruction. Likewise, the court's instruction that the alleged victims' testimony did not require corroboration constituted an impermissible judicial comment on the evidence. Mr. Fowler's convictions must be reversed.

In the alternative, the court violated Mr. Fowler's right to counsel by imposing $1135 in attorney's fees without first inquiring into whether he had the present or future ability to pay them. The order requiring Mr. Fowler to pay the cost of his court-appointed attorney must be vacated.

Respectfully submitted on August 12, 2014,

BACKLUND AND MISTRY



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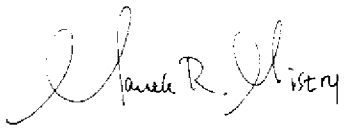

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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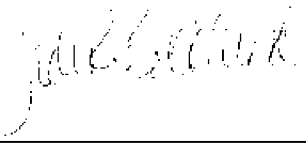
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 August 12, 2014.



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