No. 32254-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JAMES AUSTIN,

Appellant.

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

BRIEF OF APPELLANT

KATHLEEN A. SHEA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Decisions of Other Courts

Washington Statutes

Washington Rules

Constitutional Provisions

Other Authorities

A. INTRODUCTION

After a lengthy interrogation in which the detective employed the Reid Technique, Austin James "confessed" to inappropriately touching his daughter. At trial, Mr. Austin sought to explain to the jury why he had made "admissions" to the detective despite his innocence. A critical part of his defense was providing the jury with an understanding of how the interrogation tactics used as part of the Reid Technique increase the incidence of false confessions. However, the trial court excluded the crucial portions of the expert's testimony, denying Mr. Austin his constitutional right to present a defense.

In addition, the deputy prosecutor engaged in multiple acts of misconduct during closing argument, the cumulative effect of which violated Mr. Austin's right to a fair trial. The deputy prosecutor also mistakenly provided the jury with a transcript of Mr. Austin's statement that highlighted his most incriminating "admissions," requiring a new trial.

A jury found Mr. Austin guilty of first degree child molestation and he was sentenced to an indeterminate term of 60 months to life. At sentencing, the trial court improperly imposed discretionary legal financial obligations against Mr. Austin without considering Mr.

Austin's financial resources or the nature of the burden the costs and fees would impose.

B. ASSIGNMENTS OF ERROR

1. The trial court's exclusion of critical portions of testimony offered by Deborah Connolly, a forensic psychologist with expert knowledge of how interrogation tactics increase the incidence of false confessions, violated Mr. Austin's constitutional right to present a defense.

2. The trial court erred when it entered Finding of Fact 5. CP 213.

3. The trial court erred when it entered Finding of Fact 7. CP 213.

4. The trial court erred when it entered Conclusion of Law 2. CP 214.

5. The deputy prosecutor's misconduct during closing argument violated Mr. Austin's right to a fair trial.

6. Mr. Austin was denied a fair trial when the deputy prosecutor mistakenly gave the jurors an exhibit he had highlighted for his own purposes.

7. The trial court violated RCW 10.01.160(3) when it imposed $3,310 in discretionary legal fees and costs against Mr. Austin without actually considering whether he had the ability, or likely future ability, to pay them.

8. The trial court erred when it adopted finding 2.5 in the judgment and sentence, indicating that it found Mr. Austin "has the ability or likely future ability to pay the legal financial obligations imposed herein." CP 271.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The federal and state constitutions guarantee a defendant the rights to present a defense and call witnesses on his behalf. U.S. Const. amend. VI, XIV; Const. art. I, §§ 3, 22. James Austin sought to call a forensic psychologist and university professor, Deborah Connolly, to testify about how interrogation tactics used in the Reid Technique increase the incidence of false confessions. Where Mr. Austin's "confession" was essential to the State's case, did the trial court violate his constitutional right to present a defense when it prohibited Professor Connolly from testifying about how these tactics increase the incidence of false confessions and that some of the statements made by the detective could have been interpreted as promises of leniency?

2. During closing argument, the deputy prosecutor shifted the burden of proof to Mr. Austin and appealed to the jurors' passion and prejudice. Did the cumulative effect of this prosecutorial misconduct violate Mr. Austin's right to a fair trial, requiring reversal?

3. The State mistakenly provided a transcript of Mr. Austin's statement that had been highlighted for its own purposes to the jury. Is reversal required where the transcript was wrongly given to the jury and it prejudiced Mr. Austin?

4. Pursuant to RCW 10.01.160(3), a court may not impose legal costs unless it finds the defendant is or will be able to pay them. The trial court imposed $3,310 in discretionary legal fees and costs without considering Mr. Austin's financial resources or the nature of the burden these obligations would impose. Should this order be stricken and Mr. Austin's case be remanded because the trial court failed to comply with the statute when imposing these discretionary costs?

D. STATEMENT OF THE CASE

James Austin and Donnitia McClellan were involved in a romantic relationship for eleven years. 10/23/13 RP 178. They had two children together, a son J.A., and a daughter, A.A. 10/23/13 RP 176. At some point, Ms. McClellan moved out and Mr. Austin

obtained custody of the children. 10/25/13 RP 533. The court granted Ms. McClellan only supervised visitation, but Mr. Austin eventually permitted her to spend time with the kids unsupervised. 10/25/13 RP 534-35.

The children primarily lived with Mr. Austin in his mother's home. 10/23/13 RP 258. The kids had their own bedroom on the main floor with their grandmother, but usually slept with Mr. Austin in his bedroom downstairs. 10/23/13 RP 264. Although the kids had "cots" in their own room, they preferred to share Mr. Austin's twin bed. 10/23/13 RP 264-65. J.A., who is a couple years older than A.A., testified that they slept in Mr. Austin's room because it had a television, and he enjoyed watching television and playing video games before bed. 10/23/13 RP 219, 240, 242. Typically J.A. and A.A. went to bed first, and Mr. Austin came to bed later. 10/23/13 RP 242-43.

One weekend, when A.A. was staying at her maternal grandmother's home during a visit with her mother, A.A. told a cousin that Mr. Austin had touched her with his "thing," referring to his penis. 10/23/13 RP 194-95. The maternal grandmother overheard A.A. crying and called Ms. McClellan, who immediately came to the house to talk

with A.A. 10/23/13 RP 165, 167, 169. A.A. was nine years old at the time. 10/23/13 RP 177.

According to Ms. McClellan, A.A. told her that she would wake up to Mr. Austin touching her with his penis and when she moved away, he would stop. 10/23/13 RP 96. A.A. said this happened five times. Id. Ms. McClellan took A.A. back to her house, and called the police the following day. 10/23/13 RP 196-98. Detective Randolph Grant, with the Chelan Sheriff's Office, was assigned to the case. 10/23/13 RP 335-36.

Detective Grant contacted Mr. Austin and informed him that the children needed to stay with Ms. McClellan while his office performed an investigation. 10/23/13 RP 23. Detective Grant and a CPS investigator interviewed both A.A. and J.A. 10/23/13 RP 323. J.C. made no allegations during the interview. 10/23/13 RP 358. A.A. said that Mr. Austin rubbed his penis against her, and that three of the five times he had pushed her underwear out of the way and placed his penis inside of her underwear. 10/23/13 RP 278, 329, 330. However, once A.A. started wearing pajamas to bed, this stopped. 10/23/13 RP 281, 330. At trial, A.A. testified and the State played a video recording of

A.A.'s interview with the CPS investigator for the jury. 10/23/13 RP 252; 10/24/13 RP 428.

After CPS interviewed A.A., Detective Grant arranged to interview Mr. Austin. 10/23/13 RP 344. Mr. Austin arrived for the interview knowing only that an allegation of child abuse had been made. 5/25/13 RP 537. When Detective Grant revealed the substance of the allegations against him, Mr. Austin expressed shock and adamantly denied them. 10/25/13 RP 542; CP 43-45. During the first hour of the interrogation, Mr. Austin continued to deny the allegations against him. 9/5/13 RP 135-36.

During the interrogation, Detective Grant used the Reid Technique, a guilt presumptive interrogation tactic designed to secure a confession from a suspect. 9/5/13 RP 130; 10/23/13 RP 366; 10/25/13 RP 511. As part of this technique, Detective Grant presented Mr. Austin with two options: either Mr. Austin was a "sick evil" individual or a "guy who made a mistake." CP 93; 9/5/13 RP 137. Mr. Austin eventually acquiesced, choosing the less culpable option and indicating that he "made a mistake" and "probably" pushed up against A.A.'s vagina while in bed with her. CP 95.

When the audio recording of Mr. Austin's statement was played at trial, the State provided a transcript of the recording to the jury. 10/24/13 RP 415. However, as the recording was played, the deputy prosecutor realized it had provided a copy of the transcript that had been marked for his own purposes. 10/24/13 RP 418. Mr. Austin moved for a mistrial, but the trial court denied Mr. Austin's motion, instead instructing the jurors that they should disregard any marks they had seen. 10/24/13 RP 426.

Mr. Austin testified at trial that he believed no matter what he said Detective Grant would not believe him, and that he needed to admit to something in order to see his children again. 10/25/12 RP 543, 546. He explained that he sometimes woke up with an erection, with the flap in his boxer shorts no longer covering his penis, and A.A. pressed close to his body. 10/25/13 RP 544. However, whenever that happened, Mr. Austin changed his position and moved away from A.A. 10/25/13 RP 544.

Prior to trial, the defense notified the State of its intent to call an expert witness, Deborah Connolly, who has both a law degree and Ph.D. in psychology and teaches forensic law and psychology at Simon Fraser University. 10/25/13 RP 506-07. The State moved to exclude

Professor Connolly's testimony at trial. CP 33. After a hearing, the trial court granted most of the relief the State requested, allowing Professor Connolly to testify about the three phases of the Reid Technique but preventing her from offering her opinion that it increases the incidence of false confessions and that some of the statements made by Detective Grant could be interpreted as promises of leniency. CP 214.

During closing, the deputy prosecutor stated that Mr. Austin "presented no evidence, whatsoever" and "[h]e's got to prove two separate things." 10/28/13 RP 633, 679. He also, when discussing the Reid Technique, asked the jury "[a]re we supposed to let nine-year-old girls be raped and not try and get to the bottom of this?" 10/28/13 RP 681. Mr. Austin objected to the prosecutor's improper statements and at one point the prosecutor acknowledged, "[s]ometimes I get caught up, and I lose it." 10/28/13 RP 634.

The jury acquitted Mr. Austin of first degree rape of a child and first degree incest, but found him guilty of first degree child molestation. CP 265-67. Mr. Austin was sentenced to an indeterminate sentence of 60 months to life. CP 272. The court also imposed $3,310 in discretionary legal financial obligations, finding Mr.

Austin had the present or likely future ability to pay them without giving any consideration to his financial resources. CP 271, 274.

E. ARGUMENT

1. **The trial court's exclusion of Professor Connolly's opinion testimony violated Mr. Austin's constitutional right to present a defense.**

a. Mr. Austin had the right to present a defense expert's opinion.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed. 636 (1986)). There are few rights more fundamental than the defendant's right to present witnesses on his own behalf, and this right is protected by both the state and federal constitutions. State v. Franklin, 180 Wn.2d 371, 378-382, 325 P.3d 159 (2014); Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

Prior to trial, the State moved to exclude defense expert Deborah Connolly from testifying. CP 33. The court granted the State most of the relief it sought, precluding Professor Connolly from testifying that the interrogation tactics used by Detective Grant in eliciting the "confession" from Mr. Austin increase the incidence of false confessions. CP 214.

Mr. Austin's statements to Detective Grant were critical to the State's case. "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" Arizona v. Fulminate, 499 U.S. 279, 296, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)). Such persuasive evidence of guilt is difficult for any reasonable juror to dismiss. Fulminate, 499 U.S. at 296; see also Saul M. Kassin, et al., Confessions that Corrupt: Evidence from the DNA Exoneration Case Files, 23(1) Psychological Science 41-45 (2012). When the credibility of a confession is central to the defendant's claim of innocence, the exclusion of competent, reliable evidence bearing on that issue violates the defendant's constitutional right to present his defense. Crane, 476 U.S. at 690-91.

In Crane, the defendant was prohibited from presenting evidence concerning the circumstances surrounding his "confession" because the court had ruled the "confession" legally voluntary. 476 U.S. at 684. Reversing the trial court's ruling, the United States Supreme Court noted the importance of this evidence to the defendant's case:

> Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly . . . a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

Id. at 688. Thus, a criminal defendant must be given the opportunity to explain to the jury the reasons behind his "confession."

b. The trial court improperly excluded the defense expert's opinion that use of the Reid Technique increases the incidence of false confessions and that Detective Grant's statements could be interpreted as promises of leniency.

The purpose of an interrogation is "not to discern the truth, determine if the suspect committed the crime, or evaluate his or her denials." Saul M. Kassin, et al., Police-Induced Confessions: Risk Factors and Recommendations, 34(1) Law and Human Behavior 6

(2010); CP 131. "[T]he single-minded purpose of interrogation is to elicit incriminating statements, admissions, and perhaps a full confession in an effort to secure the conviction of offenders." Id. The Reid Technique is specifically designed to effectuate this purpose by: (1) isolating the suspect in a small private room; (2) confronting the suspect with accusations of guilt and refusing to accept his denials; and (3) offering sympathy and moral justification and introducing "themes" that minimize the alleged crime and lead suspects to see confessing as an expedient means to escape the interrogation. Id. at 7; CP 132.

Detective Grant testified that he used the methods espoused by the Reid Technique when interrogating Mr. Austin. 9/5/13 RP 130; 10/23/13 RP 366-67. He brought Mr. Austin into a small room, located behind lock doors, and directed him where to sit. 9/5/13 RP 134. He confronted Mr. Austin with the allegations and refused to accept his denials. 9/5/13 RP 188; CP 177. Finally, he provided justification for Mr. Austin's alleged actions, providing Mr. Austin with the option to be the "sick evil" child molester or the "guy who made a mistake." 9/5/13 191; CP 93; see also CP 178-79.

Detective Grant told Mr. Austin:

> I want you to be the guy that says okay it happened, I'm paying for my sins, I'm ready to move on. And here's why I think that you want to do that because I think that you know you made a mistake once and you want to get around it and go on okay.

CP 87. When Mr. Austin continued to state that he recalled waking up with an erection, but always repositioned himself away from his daughter when that happened, Detective Grant continued:

> You're going to say either like I said the good guy makes his mistakes, admits to them, comes forward. A lot of us make mistakes. I make mistakes all the time James. I rarely go through a day when I don't make a mistake somewhere... We have a guy that made a mistake that happened to involve one of his children okay. We have a guy over here that prays on his children day to day, what can I get out of em [sic]. He's over here photographing his kids, he's over here oh one, one guy was taping up his kids, one guy couple of guys were selling their kids. I mean those people are sick evil individuals. They've gone over the end and we don't need to deal with them anymore. Over here I've got the guy that made a mistake okay. Okay. So it'd be wrong for me to say that this guy and this guy are the same. They're opposite sides of the pole.

CP 93.

By providing a moral justification for the crime and offering sympathy and understanding ("[a] lot of us make mistakes," including the interrogator, who "makes mistakes all the time"), the interrogator

normalizes the crime and suggests that he would have behaved similarly. Kassin, supra at 12; CP 137. "[R]esearch has shown that this tactic communicates by implication that leniency in punishment is forthcoming upon confession" and "tactics that imply leniency may well lead innocent people who feel trapped to confess." Id. at 12, 18; CP 143.

Mr. Austin "confessed" to pushing against his daughter's vagina while she was sleeping only after the detective informed Mr. Austin that he was either a "sick evil" individual or a "guy that made a mistake." CP 93; 95. Faced with this dichotomy, Mr. Austin told Detective Grant, "you're right you know I made a mistake you know." CP 95. He then agreed with Detective Grant's leading question that he "probably" pushed up against his daughter's vagina. CP 95. When Detective Grant told Mr. Austin that an apology would "help," and directed him to "apologize and... tell her what you're apologizing for" Mr. Austin responded "for touching her in a wrong way" and "makin [sic] her feel uncomfortable." CP 97-98. Mr. Austin then immediately asked, "so am I ever going to see my kids again or what?" CP 98.

At trial, Mr. Austin explained to the jury that he began agreeing with Detective Grant's leading questions because he believed it was the only way he would see his children again. 10/25/13 RP 546.

Mr. Austin sought to call forensic psychologist Deborah Connolly to testify at trial about the impact the Reid Technique has on a suspect's willingness to falsely confess, and identify factors that were present during Mr. Austin's interrogation that put him at risk for falsely confessing. CP 125; 9/5/13 RP 175. She did not intend to offer an opinion as to whether any specific statements made by Mr. Austin were false. 9/5/13 RP 7.

The trial court allowed Professor Connolly to testify about the Reid Technique, but prohibited her from explaining how the technique contributes to false confessions, reasoning that there was an "insufficient basis of reliability" for her opinion testimony and that such testimony "would be highly speculative." CP 214. It also prohibited her from testifying that some of the detective's minimization statements could be interpreted as promises of leniency. CP 214. Mr. Austin later asked the court to reconsider its ruling, but this motion was denied. 10/25/13 RP 494.

At trial, Professor Connolly testified that the Reid Technique is a "guilt-presumptive interrogation tactic" designed to "secure a confession from the suspect." 10/25/13 RP 511-12. She discussed the three phases of the interrogation technique, identified for the jury how Detective Grant used the Reid Technique during Mr. Austin's interrogation, and cited the specific confrontation (or "maximization") and minimization statements he made to Mr. Austin. 10/25/13 RP 512-521. Professor Connolly was not permitted to explain how these tactics increased the likelihood of obtaining a false confession, describe the relevant research to the jurors, or identify the statements from the detective that could be interpreted as promises of leniency. CP 214.

i. *Expert testimony is admissible if the witness is a qualified expert, the subject matter is generally accepted in the relevant scientific community, and the testimony will aid the trier of fact.*

Expert testimony is admissible if (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the testimony will assist the trier of fact. In re Morris, 176 Wn.2d 157, 168-69, 288 P.3d 1140 (2012); State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984). The first and third factors in the test are required by ER 702. State v.

Copeland, 130 Wn.2d 244, 256, 922 P.2d 1304 (1996). The second factor reflects Washington courts adoption of the Frye[1] standard. Id.

The trial court found ER 702 was satisfied. Professor Connolly holds a Ph.D. in psychology and a law degree from the University of Victoria. 10/25/13 RP 507. An associate professor at Simon Fraser University and adjunct professor of law at the University of British Columbia, she had authored one published book, at least four published book chapters, and 27 published papers at the time of trial. 9/5/13 RP 156; 10/25/13 RP 506, 508-09. As a forensic psychologist and university professor, the trial court found she was qualified to present expert testimony. 10/3/13 RP 85; CP 213 (Finding of Fact 1).

The trial court also accepted that Professor Connolly's testimony would assist the jury in determining what weight to give Mr. Austin's statements to law enforcement. 10/3/13 RP 84. Despite prohibiting her from testifying about how the Reid Technique increases the incidence of false confessions, it allowed her to explain the Reid Technique and identify, at least in part, when it was used by Detective Grant. CP 213-14 (Finding of Fact 8, Conclusion of Law 1).

[1] Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923).

Thus, the court's restriction on Professor Connolly's testimony was based entirely on a finding that it was unreliable and "speculative"; in other words, it failed to meet the Frye standard because it was not based upon an explanatory theory generally accepted in the scientific community. CP 214; Copeland, 130 Wn.2d at 256.

ii. *The trial court violated Mr. Austin's right to present a defense when it excluded portions of Professor Connolly's testimony because it misunderstood the basic, generally accepted principle that performing research studies in controlled environments allow scientists to draw conclusions about human behavior.*

Only evidence involving new methods of proof or new scientific principles are subject to examination under Frye. State v. Pigott, ___ Wn. App. ___, 325 P.2d 247, 249 (2014). "Novel scientific evidence is admissible if it is based on a theory or principle which is generally accepted in the relevant scientific community, but not admissible if qualified experts have significant disputes as to its validity." Id. 248-49. "The Frye standard recognizes that 'judges do not have the expertise required to decide whether a challenged scientific theory is correct' and therefore courts 'defer this judgment to scientists.'" Copeland, 130 Wn.2d at 255 (quoting State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993)). Admissibility under Frye involves a

mixed question of law and fact, which this Court reviews de novo. Copeland, 130 Wn.2d at 255.

The trial court prohibited Professor Connolly from testifying about the following:

> the frequency of false confessions, to testify about whether the Reid technique may affect the voluntariness of a confession, to testify that some of the detective's statements could be interpreted as promises of leniency, to testify whether a false confession occurred in this case, and to testify about the effect the Reid technique had on the defendant's confession.

CP 214 (Conclusion of Law 2). In making this ruling, the court erred. As Professor Connolly testified at the pre-trial motion hearing, she was unable to offer an opinion as to whether Mr. Austin's "confession" was false. 9/5/13 RP 175. Thus, the defense was not seeking to elicit definitive statements regarding "the effect the Reid technique had on the defendant's confession" or that "a false confession occurred in this case." However, Professor Connolly should have been permitted to testify about the research showing that the Reid Technique results in an increase of both true and false confessions and that its use therefore increased Mr. Austin's likelihood of falsely confessing. Thus, to the extent the court determined this testimony would involve the "probability" that the technique affected the voluntariness of Mr.

Austin's statement or the "frequency of false confessions," the court erred. CP 214 (Findings of Fact 5, 7). The court also had no basis for excluding her conclusion that some of Detective Grant's statements could be interpreted as promises of leniency.

"General acceptance may be found from testimony that asserts it, from articles and publications, from widespread use in the community, or from the holdings of other courts." State v. Martin, 169 Wn. App. 620, 626, 281 P.3d 315 (2012). At the pre-trial hearing, Professor Connolly explained that the scientific paper she relied on to explain how the Reid Technique increases the incidence of false confessions was the first scientific review paper the American Psychology and Law Society accepted for publication in its journal in 42 years. 9/5/13 RP 163-65. She testified that journal articles are extensively reviewed prior to publication and that a scientific review paper is subjected to a particular rigorous review process. 9/5/13 RP 159-60, 163-64. She also explained that once endorsed, as this scientific review paper was, it is considered to represent the views of the American Psychology and Law Society, which is the largest North American society involving those who work on issues at the intersection of psychology and the law. 9/5/13 RP 164.

Despite Professor Connolly's undisputed testimony that the theories she anticipated discussing at trial were generally accepted in the relevant scientific community, the trial court indicated it did not believe it met the Frye standard because the court "didn't know of any generally accepted principle that you conduct – a study of university students somehow can extrapolate to being applied to suspects in criminal cases without knowing which ones falsely confessed and which ones didn't." 9/5/13 RP 183-84. In response to this concern, Professor Connolly explained that the research upon which she relied used research students in a controlled environment, as scientific studies often do, because:

> [T]he real world data will not allow you to draw causal inferences from the data, so you can't say that x caused y. In order to do that, you have to randomly assign people to different conditions, and that simply is not possible in the real word [sic]. So in order to draw causal inferences, you need lab based research involving random assignment. And those – those findings can then be tested in real world settings.

9/5/13 RP 186-87.

The State relied on State v. Rafay, 168 Wn. App. 734, 285 P.3d 83 (2012), to argue that Professor Connolly's testimony should be excluded. CP 33-35. However, in Rafay, there was no question that the explanatory theory was generally accepted in the scientific

community. 169 Wn. App. at 784. Instead, the issue on appeal was whether the expert testimony would have been helpful to the trier of fact. Id. This Court found it would not have been helpful, in large part, because the research relied almost exclusively on custodial police interrogations. Id. at 785. In Rafay, the defendants had confessed under very different circumstances involving a highly orchestrated undercover operation. Id. The defendants did not know they were talking to officers at the time of the confession and were free to come and go as they pleased. Id.

This Court also found in Rafay that the expert was unable to "estimate the percentage of confessions that are false or to identify specific interrogation techniques, either individually or in combination, that are more likely to result in false confessions than in true confessions." Id. at 787. However, as Mr. Austin argued below, significant additional research on the Reid Technique has been performed since Rafay. 9/9/13 RP 52. In Professor Connolly's report and her testimony at the pre-trial hearing, she detailed the percentage of both true and false confessions elicited from research study participants when specific interrogation tactics were used. 9/5/13 RP 213- 215; CP 169.

Professor Connolly's testimony satisfied the Frye standard. She asserted that the scientific community accepted the underlying principles she was relying on and that the article she referenced was the first scientific review paper to be endorsed by the relevant scientific community in 42 years. 9/5/13 RP 163-65. This alone was enough to satisfy Frye. State v. Martin, 169 Wn. App. at 626. When the court excluded her testimony because there was no generally accepted principle that "a study of university students somehow can extrapolate to being applied to suspects in criminal cases without knowing which ones falsely confessed and which ones didn't" it failed to defer to Professor Connolly as required. 9/5/13 RP 183-84; Copeland 130 Wn.2d at 255. The court's exclusion of the critical portions of Professor Connolly's testimony was an error that unlawfully denied Mr. Austin his right to present a defense and call witnesses on his behalf. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

c. Professor Connolly's testimony was critical to Mr. Austin's defense and its exclusion was not harmless beyond a reasonable doubt.

"Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Franklin, 180 Wn.2d at 382; see also Chapman v. California, 386 U.S.

18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). "An error is harmless only if we cannot reasonably doubt that the jury would have arrived at the same verdict in its absence." Franklin, 180 Wn.2d at 383.

Mr. Austin's statements were critical to the State's case against him at trial. Detective Grant admitted that he would not have felt comfortable arresting Mr. Austin on A.A.'s accusation alone, and made the decision to arrest only after Mr. Austin admitted to the alleged crimes. 9/5/13 RP 144. At trial, the State played Mr. Austin's recorded statement for the jury and provided the jurors with a transcript so that they could read along. 10/24/13 RP 415-16. In closing argument, the State heavily relied on Mr. Austin's admissions when it urged the jury to convict. 10/28/13 RP 607-38. Specifically, the State argued Mr. Austin's "confession" satisfied its burden to demonstrate he acted knowingly and intentionally:

> You listened to his interview tape, and you know that's what he was doing. He was aware. He woke up and continued to do it. So he knew what he was doing. And he continued to do it. That's intentional. That shows the purpose in it.

10/28/13 RP 654.

If the defense had been permitted to present testimony explaining why Mr. Austin's statements to Detective Grant were not

credible, the State's only remaining evidence at trial would have been A.A.'s testimony, which had some inconsistencies. 10/23/13 RP 274, 280. There was no physical evidence supporting A.A.'s allegations, and no other witnesses to the alleged crime.

Without Professor Connolly's testimony, the difficult task of persuading the jury that his "confession" was false fell to Mr. Austin alone. Mr. Austin explained to the jury that he believed if he told the truth, i.e. he did not have sexual contact with A.A., he would be arrested and never see his children again. 10/25/13 RP 546. He thought that by accepting the less culpable of two options posed by Detective Grant (the good guy who made a mistake versus the sick child molester), he would receive leniency from the State. 10/25/13 RP 547; CP 86. However, he was prevented from presenting expert testimony informing the jury that the interrogation tactics used in the Reid Technique result in a greater incidence of false confessions exactly because of this kind of thinking. Because the State cannot demonstrate the court's error was harmless beyond a reasonable doubt, Mr. Austin's conviction should be reversed.

2. Improper argument during the State's closing denied Mr. Austin a fair trial.

A prosecutor is obligated to perform two functions: "enforce the law by prosecuting those who have violated the peace and dignity of the state" and serve "as the representative of the people in a quasijudicial capacity in a search for justice." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Because the defendant is among the people the prosecutor represents, the prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." Id.; see also Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

"[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones." Berger, 295 U.S. at 88. "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Id. A prosecutor's misconduct may deny a defendant his right to a fair trial and is grounds for reversal if the conduct was improper and prejudicial. State v. Swanson, __ Wn. App.

__, 327 P.3d 67, 69-70 (2014) (citing In re Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); Monday, 171 Wn.2d at 675).

a. The deputy prosecutor improperly shifted the burden to Mr. Austin during closing argument.

A prosecutor may not comment on the lack of defense evidence because the defense has no duty to present evidence. State v. Thorgerson, 172 Wn.2d 438, 467, 258 P.3d 43 (2011). The "State bears the entire burden of proving each element of its case beyond a reasonable doubt." State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). "Arguments by the prosecution that shift the burden of proof onto the defense constitute misconduct." Thorgerson, 172 Wn.2d at 466.

In Fleming, the prosecuting attorney shifted the burden to the defendants in closing argument, arguing that they had failed to offer explanations for the State's evidence against them. 83 Wn. App. 214. The court reversed, finding that the misconduct was not harmless beyond a reasonable doubt and agreeing with appellate counsel's characterization that "trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging

in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." Id. at 215.

Here the deputy prosecutor similarly shifted the burden to Mr. Austin during closing argument. He told the jury that Mr. Austin did not appear to be someone who would be confused during an interrogation, stating:

> He appears to be mature. I mean, he's 34 now. He appeared to have at least average intelligence. He has presented no evidence, whatsoever, that he, in particular –

10/28/13 RP 633. Mr. Austin objected, and before the trial court could rule on the objection, the deputy prosecutor "withdrew" his statement and apologized, saying, "[s]ometimes I get caught up, and I lose it." 10/28/13 RP 634. However, in rebuttal, the deputy prosecutor again stated:

> Then he goes in, and gives a statement to law enforcement, admitting most – not all; he doesn't admit the penetration, but he admits most of it.
>
> Okay. So what do we do?
>
> Well, if he didn't do it, then we have to have two things going on here. He's got to prove two separate things.

10/28/13 RP 679. Before Mr. Austin could object, the deputy prosecutor said, "[w]ell, strike that. He doesn't – he doesn't have to

prove anything." Id. In both instances, the court did not intervene to provide a curative instruction.

Just as in Fleming, the deputy prosecutor repeatedly suggested that Mr. Austin was required to provide a reason for the jury to acquit. Although he corrected himself each time, his statements effectively implied to the jury that because Mr. Austin had confessed, it was his burden to show that he was not guilty. By suggesting Mr. Austin should have presented further evidence of his innocence, particularly given his "confession," the deputy prosecutor shifted the burden to Mr. Austin and eliminated the presumption of innocence.

b. The deputy prosecutor committed misconduct when he appealed to the passion and prejudice of the jury during his closing argument.

Mere appeals to the jury's passion or prejudice during argument are improper. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). A prosecutor retains the duty to ensure a verdict based on reason and free of prejudice. Id. at 553. In addition, a prosecutor commits reversible misconduct when it urges the jury to consider evidence outside the record and pure appeals to passion and prejudice are typically based on matters outside the record. Id.

During his rebuttal argument, the deputy prosecuting attorney stated:

> He used the Reid technique. Oh, my God, the Reid technique.
>
> You know, you got Dr. Connolly coming here. She's a nice lady. Academic and, you know, ivory tower kind of person. Everything is perfect. She's not in the trenches, with the police.
>
> Do you think that the police can't use any kind of techniques to try and get people to confess?
>
> Are we supposed to let nine-year-old girls be raped, and not try and get to the bottom of this?

10/28/13 RP 681 (emphasis added). Mr. Austin objected and the court instructed the jury to disregard the deputy prosecutor's last statement. Id.

In Reed, the prosecutor implied the defense witnesses were not credible because they were from out of town and drove fancy cars. 102 Wn.2d 140, 146, 684 P.2d 699 (1984). The court found that these statements were "calculated to align the jury with the prosecutor and against the petitioner" and when combined with other comments made by the prosecutor, constituted reversible error. Id. at 147-48. Here, the deputy prosecuting attorney's reference that Professor Connolly was an "ivory tower kind of person" who operated in an environment where

"[e]verything is perfect," was similarly designed to align the jury with the deputy prosecutor and against Mr. Austin. The implied message to the jury was that unlike Detective Grant, Professor Connolly was not one of them, and therefore not credible.

The deputy prosecutor's follow up to that suggestion, that whatever methods Detective Grant employed were justified because a nine-year-old girl was allegedly raped, was a pure appeal to passion and the jurors' prejudice. It had no basis in the evidence presented at trial and therefore constituted misconduct. See Pierce, 169 Wn. App. at 553.

c. The cumulative effect of the conduct mandates reversal.

When the defendant objects to the prosecutor's misconduct, reversal is required if there is a substantial likelihood it affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006); State v. Brown, 132 Wn.2d 529, 564, 940 P.2d 546 (1997). A prosecutor's improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in argument, and the instructions given to the jury. Brown, 132 Wn.2d at 564. Although each instance of misconduct, taken alone, may not have had a substantial likelihood of affecting the jury's verdict, "[u]nder the

cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair." State v. Emery, 174 Wn.2d 741, 766, 278 P.3d 653 (2012).

It is substantially likely that the deputy prosecutor's actions in this case affected the verdict. He repeatedly shifted the burden to Mr. Austin, suggested Professor Connolly was not to be trusted because she was an "ivory tower kind of person," and implied that Detective Grant should be permitted to use any tactics he likes to elicit incriminating statements from Mr. Austin because he was the one in the "trenches" saddled with ensuring that no one accused of molesting a little girl went unpunished.

The State's closing was the last words heard by the jury and the State's implied message to the jurors was clear: given Mr. Austin's admissions to the detective, the burden should be on him to convince the jury he was not guilty. Particularly when considered in the context of the fact that one of the primary issues at trial was whether Mr. Austin's "confession" to the detective was false, there is a substantial likelihood the deputy prosecutor's misconduct affected the verdict. This violated Mr. Austin's constitutional right to a fair trial and his conviction should be reversed. Emery, 174 Wn.2d at 766.

3. **Mr. Austin's conviction should be reversed because the jury was improperly given an exhibit with the State's highlighting that was prejudicial to the defense.**

When the State played the audio recording of Mr. Austin's "confession," it handed out transcripts of the recording to the jury. 10/24/13 RP 415. As the jury listened to the audio tape, the deputy prosecutor flipped ahead in the transcript and realized he had mistakenly provided the jurors with a copy of the transcript that he had marked for his own purposes. 10/24/13 RP 418. Marks were made in the margins of eight pages, and one page contained underlining. 10/24/13 RP 422; Ex. 6. A juror reviewing only the marked portions of the transcript, which appeared over the course of several pages, would read:

> Grant: ...just kind of rub up against her and I mean we're guys.
>
> Austin: I guess that's what happened. My daughter's not a liar.
>
> Austin: All I can remember is just waking up with an erection.
>
> Grant: So when this has happened, well tell me the first time it happened, I mean about when, when is it? Are we talking fall, we talking October, we talking?

Grant: A year ago?

Grant: Okay.

Austin: No, like twice.

Grant: Did you push up against her vagina?

Grant: Okay so you woke up, started and then you just did it a little more?

Austin: 5 minutes tops you know.

Austin: It felt good at the moment I guess.

Austin: For touching her in a wrong way.

Grant: You're saying then that probably a couple of times when you woke up you were erect and you rubbed a little more. Is that correct?

Austin: Yes.

Grant: What else can you tell me James? Help me to understand what happened.

Austin: That's it. She, she would kind of push up back up against me and then it was only couple of minutes later I was like what the hell is this, what am I am doing here.

Id. Taken in isolation, the marked portions of the transcript present a significantly abbreviated version of Mr. Austin's "confession" that emphasize Mr. Austin's most incriminating statements.

When the error was discovered, Mr. Austin moved for a mistrial. 10/24/13 RP 421. The trial court denied Mr. Austin's motion, instead telling the jurors to disregard any markings they may have seen in the transcript. 10/24/13 RP 426. It did not question the jurors to determine whether any of the jurors had seen the marks and whether the jurors had been influenced by the State's emphasis of specific testimony.

"It is... misconduct for a jury to consider extrinsic evidence and if it does, that may be a basis for a new trial." State v. Pete, 152 Wn.2d 545, 552, 98 P.3d 803 (2004). In Pete, the jury was accidentally given a copy of the police officer's written report and the defendant's statement. Id. at 550. While the court found that the defendant's oral and written statements were admissible, neither document had been admitted at trial. Id. The jury had the documents for only a brief time, they were instructed to disregard the documents, and the statements contained within the documents were largely exculpatory. Id. at 551. However, the court reversed, finding the jury received evidence it

should not have, and that this evidence prejudiced the defendant. Id. at 554-55; see also State v. Smith, 55 Wn.2d 482, 348 P.2d 417 (1960) (reversal required where the jury inadvertently received the defendant's unproved aliases on the cover sheet of instructions and verdict forms); State v. Rinkes, 70 Wn.2d 854, 425 P.2d 658 (1967) (a newspaper editorial and cartoon sent into the jury room by mistake required reversal).

Here, the highlighted transcript mistakenly given to the jury did not provide the jurors with extrinsic evidence, but it did provide the jurors with a quick review of what the State thought was most noteworthy. Washington courts have recognized that the unique nature of recorded statements require precautions be taken to ensure that undue emphasis is not placed on specific portions of that evidence. See State v. Koontz, 145 Wn.2d 650, 657, 41 P.3d 475 (2002); State v. Morgensen, 148 Wn. App. 81, 87, 197 P.3d 715 (2008); State v. Monroe, 107 Wn. App. 637, 638, 27 P.3d 1249 (2001). In Morgensen, this Court found the trial court took appropriate precautions when it played the recordings of the entire testimony at issue in order to avoid undue emphasis on any part of the testimony, and carefully instructed

the parties not to make any facial expressions during the playing of the testimony. 148 Wn. App. at 90.

The highlighted transcript provided to the jury did just the opposite: it emphasized specific parts of Mr. Austin's statement and gave the jurors insight into what the State thought was most objectionable. Because the jury should not have received this copy of the exhibit and it was prejudicial to Mr. Austin, this Court should reverse. See Pete, 152 Wn.2d at 552.

4. The legal costs imposed against Mr. Austin should be stricken and the case remanded because the court failed to consider Mr. Austin's resources and the nature of the burden such costs would impose as required by RCW 10.01.160(3).

a. The court ordered Mr. Austin to pay $3,310 in discretionary legal costs without actually considering whether he had the ability to pay them.

Under RCW 10.01.160, a court may order a defendant to pay legal financial obligations, but it "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." In determining the amount of financial obligations, "the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." At sentencing, the trial court ordered Mr. Austin to pay $3,910 in legal financial obligations,

which included discretionary costs of $450 for a court appointed attorney and $2860 in court costs. CP 65.

Formal findings supporting the trial court's decision to impose legal financial obligations under RCW 10.01.160 are not required, but the record must minimally establish that the sentencing judge actually considered the defendant's individual financial circumstances and made an individualized determination he has the ability, or likely future ability, to pay. State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). In this case, boilerplate language in the Judgment and Sentence stated:

> 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. (RCW 10.01.160) The court makes the following specific findings: The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 9. However, nothing in the record suggests that the court actually considered Mr. Austin's financial circumstances before imposing the costs, or determined it was likely Mr. Austin would be able to pay the discretionary costs imposed in the future. When imposing the legal

obligations, the court made no inquiry into Mr. Austin's financial resources whatsoever. RP 427-34.

b. An illegal sentence may be challenged for the first time on appeal, and is ripe for review upon imposition of the sentence.

Mr. Austin did not object to the imposition of these financial obligations. This Court indicated in State v. Blazina that it may decline to consider a challenge to costs raised for the first time on appeal, despite addressing this issue in past cases. 174 Wn. App. 906, 911, 301 P.3d 492 (2013), rev. granted 178 Wn.2d 1010 (2013). However, it is well established that an illegal or erroneous sentence may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999). The imposition of $3,310 in discretionary financial obligations was an unlawful sentencing order.

The court ordered that monthly payments of $25 per month were to commence within 60 days. CP 275. While this Court has previously suggested legal costs may be challenged only after the State seeks to enforce the order, those cases did not address the validity of an order that failed to comply with RCW 10.01.160(3). See e.g. State v. Lundy, 176 Wn. App. 96, 107, 308 P.3d 755 (2013); State v. Ziegenfuss, 118 Wn. App. 110, 74 P.3d 1205 (2003). A claim is fit for

judicial determination "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). This order meets all of these requirements. The court's failure to comply with RCW 10.01.160(3) is a legal issue fully supported by the record. Although Mr. Austin could later seek to modify the court's order, that fact does not change the finality of the original sentencing order. Mr. Austin is entitled to review of the unlawful order of costs imposed by the trial court.

c. Mr. Austin's case should be remanded because the record does not show the trial court would have found the evidence established he had the ability to pay $3,310 in discretionary legal financial obligations.

Remand is the appropriate remedy when the trial court fails to comply with a sentencing statute unless the record clearly indicates the court would have imposed the same condition regardless. State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185, 35 L.Ed.2d 297 (2013) (citing State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997)). Here, the record does not show the evidence supported a finding that Mr. Austin had the ability, or likely future ability, to pay the legal fees and

costs. Instead, the court appeared to impose them as a matter of course, without giving any consideration to Mr. Austin's financial resources.

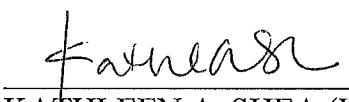
Mr. Austin is entitled to have the court's finding that he had the ability, or likely future ability, to pay the legal financial obligations stricken because it is unsupported by the record. Bertrand, 165 Wn. App. at 404. In addition, his case should be remanded for the trial court to consider whether Mr. Austin does, in fact, have the ability or likely future ability to pay the legal costs.

F. CONCLUSION

Mr. Austin asks that this court reverse and remand for a new trial because the court denied his right to present a defense when it excluded critical portions of the defense expert's testimony and because the deputy prosecutor engaged in misconduct and mistakenly provided the jury with a highlighted transcript, which denied Mr. Austin a fair trial. At a minimum, Mr. Austin's case should be remanded with instructions to the trial court to consider whether he has the ability, or future ability, to pay the discretionary legal financial obligations.

DATED this 2nd day of October, 2014.

Respectfully submitted,



KATHLEEN A. SHEA (WSBA 42634)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent,	)	NO. 32254-8-III
JAMES AUSTIN, Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF OCTOBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	DOUGLAS SHAE, DPA CHELAN COUNTY PROSECUTOR'S OFFICE PO BOX 2596 WENATCHEE, WA 98807-2596	(X) U.S. MAIL ( ) HAND DELIVERY ( ) _____
[X]	JAMES AUSTIN 370770 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) U.S. MAIL ( ) HAND DELIVERY ( ) _____

SIGNED IN SEATTLE, WASHINGTON, THIS 2ND DAY OF OCTOBER, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711