

FILED
Jun 07, 2016
Court of Appeals
Division I
State of Washington

No. 74036-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER LEWIS LOCKEN,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The State of Washington accused Christopher Locken of sideswiping David Solis as he stood at the edge of a dirt road with his newlywed. The State argued Mr. Locken did this because he was bitter the woman chose to be with his friend and not with him.

Mr. Locken and his passenger testified they only splashed Mr. Solis with mud, but that is all. The police saw no injury. Mr. Solis declined medical aid. Apparently not persuaded that Mr. Solis was struck, the jury acquitted Mr. Locken of the hit and run allegation. More immature prankster than a villain, Mr. Locken tried to present evidence that two-way smack talk preceded the incident. But, the trial court refused to let the jury learn of Mr. Solis's role in this puerile relationship.

The assault in the second degree conviction should be reversed because the trial court's misapplication of the hearsay rule limited several fundamental constitutional rights, including the right to confront, to present a defense, and to testify.

Additionally, legal financial obligations imposed without any inquiry into ability to pay should be reversed and stricken.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in using the hearsay rule to keep the jury from learning the complainant previously made his own hyperbolic threats to Mr. Locken.

2. The trial court erroneously excluded evidence probative of the complainant's relationship with Mr. Locken and directly relevant to assessing whether the complainant was actually placed in "reasonable apprehension and imminent fear" when Mr. Locken drove toward him.

3. The trial court violated Mr. Locken's constitutional right to confrontation by limiting his ability to cross-examine his accuser with evidence of bias and motive to fabricate.

4. The trial court violated Mr. Locken's right to testify by preventing him from explaining the complainant's own idle talk.

5. The trial court violated Mr. Locken's right to present a defense by preventing his witness from doing the same.

6. The trial court's boilerplate finding that a brain-injured man subsisting on disability payments has the ability or likely future ability to pay legal financial obligations imposed against him is not supported by the record.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The constitutional right to confrontation guarantees an accused the right to present relevant evidence showing the possible biases and motives of the witnesses against him. The right to present a defense and the right to testify likewise protect the accused's ability to defend himself in front of a jury.

Here, the trial court relied on the hearsay rule to prohibit Mr. Locken from presenting evidence that his principal accuser had willingly engaged in a war of words with him, which included Mr. Solis threatening death. But hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted and the relevance of Mr. Solis's past statements did not depend on their truth. ER 801(c). In fact, the complainant's words were probative of Mr. Locken's innocence precisely because the two-way text exchange was puffery and idle talk, not credible true threats.

Did the court's ruling, which caused the jury to hear a skewed depiction of the men's relationship, violate Mr. Locken's constitutional right to confront his accusers, his right to testify, and his right to present a defense?

2. A trial court must inquire into a defendant's current and future ability to pay before imposing legal financial obligations. State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). Mr. Locken was deemed indigent for the purposes of trial and appeal. Testimony revealed he receives disability payments because of a brain injury.

If the trial court ordered Mr. Locken to pay \$1,117 in legal financial obligations without inquiring as to his present or future ability to pay, should these monetary obligations be reversed and stricken?

D. STATEMENT OF THE CASE

In a two count information, the State alleged that on December 6, 2014, Christopher Locken committed an assault in the second degree (assault with a deadly weapon) and a hit and run (injury), both involving David Solis. CP 44-46.

Residents of Whidbey Island, Mr. Locken and Mr. Solis have known each other a long time. RP143. Mr. Solis is married to Megan McAdams, who also knew Mr. Locken. RP143. When Mr. Solis was in jail, Ms. McAdams spent about a week at Mr. Locken's home, sharing a bed with him. RP241 (testimony of Mr. Locken's grandmother); RP258-260 (testimony of Mr. Locken).¹

Mr. Solis and Ms. McAdams claimed that Mr. Locken had called and texted them and that this communication was "like weird upset stuff... threatening or violent... a lot of the time it was just not sensical at all [sic]... kind of crazy stuff." RP143-44; RP196 (Ms. McAdams testifying about "threats... weird obsessive messages.")

Mr. Solis was "not really" worried by these messages, even though they included a colorful invitation to a duel. RP145-46. On the day of the alleged assault, Mr. Locken supposedly wrote to Mr. Solis: "Do you want to do pistols at high noon?" RP223, 235.

¹ Ms. McAdams said she had not been in a romantic relationship with Mr. Locken. RP191.

Mr. Solis testified that “sometimes” he responded with what he called “my own kind of crap-talking I guess.” RP144, 145. He said the texts were “irritating” and had a “threatening” nature. RP146. The two men never actually fought. RP146.

That day, Mr. Solis and Ms. McAdams were hitchhiking. RP147. Mr. Solis had texted back and forth with Mr. Locken and let him know where they were. RP147. He did not think Mr. Locken would come to them and was not afraid. RP173.

Mr. Solis testified that as he was standing at an intersection with Ms. McAdams, he saw Mr. Locken’s car driving toward them and it “just cut the corner,” close to where they were. RP150. Mr. Solis said the car slowed down going into the turn. RP151. The car slowed down to “somewhere between 10 and 20 miles-an-hour.” RP152. Mr. Solis said he pushed Ms. Adams off to the side but was hit himself, falling backwards into the mud. RP151, 161, 167. Mr. Locken’s car turned around and left. RP161, 190. Ms. McAdams gave a similar account of this event. RP188-190.

On re-direct, the prosecutor led Mr. Solis to say that as the car approached, he was in fear of being run over. RP184.

Ms. McAdams testified she “was more [in] shock than fear” and “didn’t really know what to think right at that second.” RP195.²

The police officer who responded to the scene checked the muddled Mr. Solis for injuries but saw none. RP232. Mr. Solis raised his shirt, but the officer “did not see anything.” RP232. Mr. Solis’ skin was not even red. RP232. Mr. Solis declined medical aid that day. RP162. He said he sought care later. RP162, 168.

Mr. Locken testified he had a misunderstanding with Mr. Solis in the past, because he was confused as to who Mr. Solis was dating. RP260. When this was cleared-up, he was no longer jealous. RP265-66, 268, 270, 274.³

Mr. Locken meant to be funny, but not harmful, when he drove by Mr. Solis and Ms. McAdams. RP262. He testified that Ms. McAdams “was way out of the way.” RP262. As he approached, he made sure he did not endanger Mr. Solis:

And I wasn't looking directly at him when I drove by because **I was making sure I stayed on the road or the**

² She was not named as a complainant. CP 44-46.

³ Mr. Locken’s testimony on this point may have been hard for the jury to follow. E.g. RP271-72 (discussing his belief that God “wiped” the memory of the woman he had mistaken Ms. McAdams for). When younger, Mr. Locken suffered a serious brain injury. RP258, 268, 279.

dirt path. And drove by and sprayed the mud on him. Turned around and laughed at him a whole bunch when we drove by because **we thought it was pretty funny that he was soaked in mud.**

RP 262 (emphasis added).

There was space between Mr. Locken's car and Mr. Solis. RP265. Mr. Locken was certain that Mr. Solis would not be harmed: "I could easily tell by the angle of descent or whatever that he was not going to be hit by the vehicle." RP265. He had made a "kind of a half-ass attempt" to make Mr. Solis think he would be hit, but Mr. Locken "had to go slow enough to make sure I could miss him." RP276.⁴

Mr. Locken's passenger, Jerah Gleason, also testified that Mr. Locken did not aim the car at Mr. Solis. RP250. Mr. Gleason testified that Mr. Solis was not struck. RP249. Mr. Gleason testified Mr. Solis was only splashed with mud. RP246.

The prosecution presented some undated text communications from Mr. Locken to Mr. Solis. RP143-44. This

⁴ Mr. Locken said he was hoping to spray mud on Mr. Solis and that is it. RP266-67. He also spoke of some "original intention" to scare Mr. Solis "and then hopefully splash him... we managed to getting [sic] both done." RP263, 275. The jury was instructed that an assault is both an intentional striking of another that is harmful or offensive, and "also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury." CP 23.

included Mr. Locken’s pronouncements to Mr. Solis that he “could split his wig at 50 yards,” that he had his “Walter [handgun] and [Mr. Locken] was planning to split [his] wig,” and that Mr. Solis “should be afraid” and feel “lucky [he] escaped with [his] life.” RP273.

The trial court rejected Mr. Locken’s attempts to let the jury know what Mr. Solis had been saying to him. RP112-16, 135-38, 245-46, 251, 260-63, 266, 273-74 (excluded statements included “a threat to kill,” expressions of desire to “beat [Mr. Locken] down,” invitation “to fight,” and “disgusting things” said about Mr. Locken’s grandmother.)

The jury declared Mr. Locken not guilty of the gross misdemeanor offense of hit and run as charged in Count II. CP 12. The jury convicted Mr. Locken of the strike offense of assault in the second degree charged as Count I. CP13.

At sentencing, the trial court awarded restitution and also assessed the following legal financial obligations against Mr. Locken: \$500 victim assessment,⁵ \$217 court costs,⁶ and \$400

⁵ Citing RCW 7.68.035

⁶ Citing RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190

fees for court appointed attorney.⁷ CP 6. These financial obligations were imposed without any inquiry into Mr. Locken's ability to pay. RP357-362.

E. ARGUMENT

1. The trial court's refusal to let Mr. Locken present evidence that the complainant made threatening out-of-court statements similar to the idle talk the State used to convict him, violated his basic constitutional trial rights.

- a. The constitutional right to confront, to present a defense, and to testify are the fundamental tools for defending oneself in court.

A defendant's right to impeach a prosecution witness with evidence of bias is guaranteed by the constitutional right to confront witnesses. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998); U.S. Const. amend. VI; Const. art. I, § 22.

The constitutional right to confrontation encompasses the right to reveal the witness's possible biases, prejudices, or ulterior motives as they may relate directly to issues or personalities in the case at hand. Davis, 415 U.S. at 316. "The

⁷ Citing RCW 9.94A.760

partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony.” Id. (internal quotation marks and citation omitted).

The most fundamental aspect of this right is the ability to conduct a meaningful cross-examination of adverse witnesses. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). It is fundamental that a defendant charged with the commission of a crime must be given great latitude to show the possible motives or biases of prosecution witnesses. State v. Spencer, 111 Wn. App. 401, 410, 45 P.3d 209 (2002). A defendant has a right to confront the witnesses against him with evidence of bias so long as the evidence is at least minimally relevant. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without it. ER 401.

Furthermore, a criminal defendant has a constitutional right to testify on his or her own behalf. Rock v. Arkansas, 483

U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). “On the federal level, the defendant's right to testify is implicitly grounded in the Fifth, Sixth, and Fourteenth Amendments,” and in Washington it “is explicitly protected under our state constitution.” State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). “This right is fundamental, and cannot be abrogated by defense counsel or by the court.” Id.

The right to present witnesses in one’s own defense is likewise an essential trial right: “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.” Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Franklin, 180 Wn.2d 371, 378, 325 P.3d 159 (2014).

A trial court’s decision to admit or exclude evidence is generally reviewed for abuse of discretion. Darden, 145 Wn.2d at 619. A court necessarily abuses its discretion if it denies a criminal defendant’s constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). The Court reviews a claim of the denial of constitutional rights de novo. Id.

- b. The trial court's misapplication of the hearsay rule prevented the jury from learning the incident was preceded by two-way empty vitriol and this fact was of relevance to determining whether an assault occurred.

Pretrial, defense counsel said that she was prepared to produce from Mr. Locken's cell phone, the complainant's "statements back to Mr. Locken that were inflammatory." RP112. The parties discussed the text exchanges between Mr. Locken and Mr. Solis. RP114-16. The trial court agreed with the State that "statements made by Mr. Solis are hearsay," but that what Mr. Locken had texted would be allowed into evidence as an admission of a party opponent. RP135-38.

Defense counsel had specified that:

Mr. Solis actually made a threat to kill my client, Mr. Locken. And that is in the phone that is in the Jail that could be provided and that would show the entire conversation.

RP137.

Defense counsel further tried to explain that "[t]he fact that Mr. Locken has been threatened by Mr. Solis is something that is an issue to whether or not this was a one-sided thing, which Mr. Solis is attempting to say." RP138.

The passenger, Mr. Gleason, knew that Mr. Solis had threatened Mr. Locken. RP 245, 246, 251. The trial court sustained each of the State's objections when Mr. Gleason began to tell the jury about this. RP245, 246, 251 (witness trying to tell the jury that "Mr. Solis had made threatening texts to [Mr. Locken] saying he was going to kill him. He wanted to beat [Mr. Locken] down and he wanted to fight him.")

The trial court repeatedly stopped Mr. Locken from testifying about what Mr. Solis had said to him and how this had affected him. RP260, 261. Mr. Locken could not explain the background to the relationship. RP262-63 (objection sustained when Mr. Locken said "He had been trying to get me to fight him for months. And at this point I didn't want to fight him, and I pretty much just—").

Mr. Locken was not allowed to testify how Mr. Solis' past threats pertained to the charge:

[Mr. Locken]: This wouldn't have even happened if he would have shut up. And he kept egging me on, and I thought it would be funny to--

[Prosecutor]: Objection.

THE COURT: Sustained.

RP266.

Mr. Locken was asked if he was “pretty angry” with Mr. Solis, but prohibited from explaining the context of the relationship:

[Mr. Locken]: He was saying pretty disgusting things about my

grandmother. About my other --

[Prosecutor]: Nonresponsive.

THE COURT: Sustained.

RP273-74.

The trial court misapplied the hearsay rule. RP 135-38.

Only statements “offered in evidence to prove the truth of the matter asserted” are hearsay. ER 801(c). What Mr. Solis had said out-of-court was not offered for its truth, but to impeach the complainant, to expose his bias, and to show its effect on the listener, Mr. Locken. Mr. Solis’ out-of-court statements were relevant irrespective of their truth. In fact, Mr. Solis’ threat to kill Mr. Locken – a statement he would likely disavow as idle talk – was relevant precisely because Mr. Solis did not mean what he texted. The trial court’s refusal to allow Mr. Locken present this critical (non-hearsay) information violated his fundamental constitutional trial rights.

Mr. Locken should have been allowed to revealing to the jury that Mr. Solis had threatened to kill him, RP 137-38, and

was otherwise dishing out just as much vitriol as what was attributed to Mr. Locken. This information was relevant to the key question of whether Mr. Solis was placed in reasonable fear of imminent harm on December 6, 2015.

Mr. Solis said that when he saw Mr. Locken drive toward him he was scared his friend would hit him. RP184. Mr. Locken testified he had the car under control and what he meant to do was get mud on Mr. Solis. RP262, 265, 276. The jury had to decide whether Mr. Solis was actually placed in “reasonable apprehension and imminent fear.” CP 23, 28 (jury instructions relevant to assault). The background to the relationship was directly relevant to resolving this question.

The State repeatedly turned to Mr. Locken’s texts to prove he wanted to assault Mr. Solis, which is why the prejudice to Mr. Locken from not being able to introduce the other side of the story was so great. RP 273; RP191, 196 (Ms. Adams testifying); RP222-23 (police officer reading a text Mr. Solis said he received from Mr. Locken).

In closing, the prosecution argued:

Defense doesn't want to talk about the texts that Mr. Locken was sending... Mr. Locken indicated *'I'll kill*

you. I could split your wig at 50 yards.’ I assume that means he could shoot him at 50 yards.

RP343 (emphasis added).

But the fact that Mr. Solis responded in kind shows that neither man meant what they tapped-out to each other on their telephones. There was no evidence that Mr. Locken owned a “Walter” [sic] or any other gun. RP273. The boast that he is a marksman worthy of qualifying for Olympic pistol-shooting events was unsupported. RP273.

The significance – or rather, the lack of significance – of the ongoing exchange between the two young men should have been made known to the jury. The prosecutor asked Mr. Locken to admit that in his text to Mr. Solis he said that he wanted to hurt or kill Mr. Solis. RP274. In a testy exchange between a prosecutor armed with one-half of the truth and a defendant who had been repeatedly told that the full truth could not come out, all that Mr. Locken was able to say was: “You’re reading them incorrectly.” RP274.

Presumably, if confronted with the fact that he threatened Mr. Locken with death in a text of his own, Mr. Solis would deny committing a felony harassment and explain he did not

mean what he had written to Mr. Locken. Indeed, Mr. Solis said he responded to some of Mr. Locken's threatening texts. RP144-45. He downplayed what he did as "[his] own kind of crap-talking." RP144, 145. But, the jury heard no details as to what Mr. Solis actually said and his words sound just as serious as Mr. Locken's. RP144-45, 173.

Not allowing Mr. Locken to inform the jury that Mr. Solis had been threatening him, that this included a threat to kill, and other vibrant language directed at Mr. Locken and his grandmother, undercut Mr. Locken's ability to argue that Mr. Solis had not been placed in a reasonable fear of anything and in the process denied him his fundamental trial rights.

If a witness recounts a statement made by another witness to show bias on the part of the second witness, the statement is not objectionable as hearsay because it is not being offered to prove the truth of the matter asserted.⁸ Spencer, 111 Wn. App. at 408-09. Instead, the statement is offered to show

⁸ "Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence *to prove the truth of the matter asserted.*" ER 801(c) (emphasis added).

the second witness's mental state and therefore falls under an exception to the hearsay rule.⁹ Id.

In Spencer, defense counsel moved to allow a witness to testify about statements allegedly made to her by another prosecution witness, demonstrating bias. Spencer, 111 Wn. App. at 405-06. According to the first witness, the second witness, who was the defendant's girlfriend, told her that the police threatened to take her to jail if she did not tell them what they wanted to hear, and that she was angry at the defendant because he had another girlfriend. Id. at 409. On appeal, the Court held the evidence was not inadmissible hearsay because it was not offered to prove that the police had actually threatened the witness. Id. Instead, the statement was admissible to show the witness's state of mind. Id.

As in Spencer, Mr. Solis' statement demonstrating his own hostility and bias against Mr. Locken was not offered to prove the truth of the matter asserted but rather to show Mr.

⁹ The following kind of out-of-court statement is not excluded by the hearsay rule: "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." ER 803(a)(3).

Solis disposition (state of mind) toward Mr. Locken. Thus, it was not inadmissible hearsay. Moreover, the evidence was critical to weighing whether Mr. Solis was actually placed in fear, and if so, whether that fear was reasonable.

c. The cumulative errors prejudiced Mr. Locken

The error was clearly prejudicial. Without needing to account for Mr. Solis' participation in the ongoing verbal feud – and the reality that neither party had made a serious credible threat – the prosecutor was able to make the following argument:

If you take the defense's idea of this case, I could leave today. I could go down to Coupeville High School or wherever else, a - a daycare where there's kids out in the street, and I could drive my car off the shoulder and go right at these people and then at the last second going 20 miles-an-hour turn away, and there would be no crime. Because I didn't intend to run over any little kids or anything. That doesn't make sense.

RP 347-48.

Had the jury been appropriately informed that Mr. Solis himself made empty threats against Mr. Locken, this argument would not have worked. In the above hypothetical, the only conclusion is that the actor means or intends to frighten the other, but the interpretation of Mr. Locken's allegedly criminal

act depends on its context. The trial court's misapplication of the hearsay rule took away this key context from the jury, which is why the conviction should be reversed.

The way the case was presented to the jury, one man was "making threats" and the other just "crap talking." The reality is, that neither man was a victim of a crime because no crime had occurred.¹⁰

Mr. Solis was equal participant; both of the men had engaged in the exchange. Of course, the jury cannot evaluate whether the assertion that Mr. Solis is "crap talking" unless it can compare the text of what he said to Mr. Locken against what Mr. Locken said to him. This solution the trial court refused.

As a result of the trial court's ruling, the jury was misled that Mr. Locken caused Mr. Solis "reasonable apprehension and imminent fear," when in fact the mud-splashing, like the two-way puerile sparring by text message that came before it, was just not that serious. Both men had engaged in facially-sinister puffery, but only one ended up charged and convicted of a serious offense.

Made to be the butt of a foolish practical joke in front of his wife, Mr. Solis was motivated in his testimony by a desire to come out on top. But this is a story of two dunces, not just one. The trial court's ruling to exclude what Mr. Solis had texted to Mr. Locken out of court was erroneous because the statement was not offered for the truth of the matter asserted and thus not hearsay.

Mr. Locken's defense was denial. It was therefore critical that he be allowed to challenge the motives and biases of the single complainant. Mr. Solis' out-of-court threat to kill Mr. Locken shows that Mr. Solis was not scared of Mr. Locken and never frightened by the out-of-court talk. Certainly Mr. Solis never turned to the police when he and Mr. Locken were involved in their exchanges.

The trial court's ruling precluding Mr. Locken from eliciting relevant evidence that could have revealed the witness's possible motives and biases violated his constitutional right to confrontation. Davis, 415 U.S. at 316; Hudlow, 99 Wn.2d at 16.

¹⁰ Certainly the State did not press a felony harassment charge against either Mr. Locken or Mr. Solis based on what they had said to each other out-of-

d. The error requires reversal

Because a defendant has a constitutional right to impeach a prosecution witness with evidence of bias, any error in excluding such evidence is presumed prejudicial. Spencer, 111 Wn. App. at 408. Reversal is required unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. Id.

In assessing whether the error was harmless, the Court may not “speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it.” Davis, 415 U.S. at 317. Instead, the Court must conclude that “the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness’s] testimony.” Id.

Mr. Solis, as the complainant, was the critical State witness. There was a dispute as to whether he was actually hit or not. His fiancée, Ms. McAdams, did not testify that the approaching car caused her fear. RP195. It was Mr. Solis alone who supplied the information from which the jury could convict

court.

Mr. Locken of assault on the “reasonable apprehension” theory. Mr. Locken was entitled to wide latitude to explore Mr. Solis’ biases and motives.

“On direct review, the government's commission of a constitutional error requires reversal of a conviction unless the government proves ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’”
United States v. Garibay, 143 F.3d 534, 539 (9th Cir.1998)
(quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

It is likely that had the jury heard the evidence, they would have been receptive to the suggestion that what Mr. Locken had done was not an assault at all. On the other hand, without the evidence, the jury would likely been viewing Mr. Locken’s testimony with great skepticism. Here, exclusion of the evidence was not harmless beyond a reasonable doubt. A new trial should be ordered.

2. The Court should strike the legal financial obligations because Mr. Locken lacks the ability to pay and because the trial court did not inquire as to his ability to pay.

At sentencing, the court imposed a \$500 victim assessment, \$217 in court costs (criminal filing fee plus sheriff service fee), and \$400 for court appointed counsel. CP 6. These fees bear interest at the statutory interest rate. CP 7.

Mr. Locken had a court-appointed lawyer provided to him at public expense for the trial. In closing argument, the prosecutor ridiculed the idea that Mr. Solis' claims against the accused may have been financially-driven, precisely because Mr. Locken is indigent. RP342 ("I'm not sure what kind of payday he'd be looking for from Mr. Locken, who states he's on SSI and lives in a garage.") A short time later, Mr. Locken was appointed undersigned counsel on appeal due to his continuing indigency.

The trial court did not inquire into Mr. Locken's financial situation. The judgment and sentence findings reflect a boilerplate statement "That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein." CP 7.

Our legislature mandates that a sentencing court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). The Supreme Court recently emphasized this means “a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs.” State v. Blazina, 182 Wn.2d at 830; accord State v. Duncan, ___ Wn.2d ___, 2016 WL 1696698, *2-3 (Apr. 28, 2016) (remanding to trial court for resentencing with “proper consideration” of defendant’s ability to pay).

Imposing LFOs on indigent defendants causes significant problems, including “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” Blazina, 182 Wn.2d at 835. LFOs accrue interest at a rate of 12%, so even a person who manages to pay \$25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. Id. at 836. This, in turn, causes background checks to reveal an “active record,” producing “serious negative consequences on employment, on housing, and on finances.” Id.

at 837. All of these problems lead to increased recidivism.

Blazina, 182 Wn.2d at 837; Duncan, 2016 WL 1696698 (Apr. 28, 2016) (recognizing the “ample and increasing evidence that unpayable LFOs ‘imposed against indigent defendants’ imposed significant burdens on offenders and our community” (quoting Blazina, 182 Wn.2d at 835-37)).

Thus, a failure to consider a defendant’s ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. See RCW 9.94A.010.

The appearance of mandatory language in the statutes authorizing some of the costs imposed here does not override the requirement that the costs be imposed only if the defendant has the ability to pay. See RCW 7.68.035 (penalty assessment “shall be imposed”); RCW 36.18.020(2)(h) (convicted criminal defendants “shall be liable” for a \$200 fee); State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). These statutes must be read in tandem with RCW 10.01.160, which requires courts

to inquire about a defendant's financial status and refrain from imposing

Indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, *The Assessment and Consequences of Legal Financial Obligations in Washington State*, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay); see Blazina, 182 Wn.2d at 836 (discussing report by Beckett et al. with approval).¹¹ Thus, it has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. See Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Mr. Locken concedes that the government has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished

¹¹ Available at: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

people like him is not rationally related to the goal, because “the state cannot collect money from defendants who cannot pay.” Blazina, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature’s stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; Blazina, 182 Wn.2d at 837. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.¹²

This Court should apply a remedy in this case notwithstanding that the issue was not raised in the trial court. In Blazina, the Supreme Court exercised discretionary review under RAP 2.5(a) because “[n]ational and local cries for reform of broken LFO systems demand” it. 182 Wn.2d at 835. The Court re-emphasized this holding in Duncan, 2016 WL 1696698, at *2-3.

This case raises the same concern. See also Blazina, 182 Wn.2d at 841 (Fairhurst, J. concurring) (arguing RAP 1.2(a),

¹² Division Three recently held that despite the equal hardships imposed by “mandatory” and “discretionary” LFOs, it could not agree with the above statutory interpretation or constitutional grounds to reverse the imposition of a \$500 victim penalty assessment and \$100 DNA fee. State v. Mathers, ___

“rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits,” counsels for consideration of the LFO issue for the first time on appeal).

Blazina clarified that sentencing courts must consider ability to pay before imposing LFOs. Accord Duncan, 2016 WL 1696698, at *2-3. Because the record demonstrates Mr. Locken’s indigence, this Court should remand with instructions to strike legal financial obligations, and strike the boilerplate finding that Mr. Locken has the ability to pay.

Finally, in the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs. See RAP 14; see also RAP 1.2(a), (c); RAP 2.5.

As set forth above, the imposition of costs on an indigent defendant is contrary to the statutes and constitution. The presumption of indigence continues on appeal pursuant to RAP 15.2(f). State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). The law and facts call for an exercise of this Court’s discretion not to impose appellate costs against Mr. Locken.

Wn. App. __, _____ (May 10, 2016). For the reasons set forth above, this Court should not follow Mathers.

RAP 1.2(a), (c); RAP 2.5; Blazina, 182 Wn.2d at 835; id. at 841
(Fairhurst, J. concurring).

F. CONCLUSION

The trial court's exclusion of relevant evidence, based on a misapplication of the hearsay rule, unreasonably restricted Mr. Locken's constitutional right to present evidence of the bias and motive of the complainant. The ruling likewise impermissibly curtailed his constitutional right to testify and his right to call witnesses in his own behalf. The conviction should be reversed for a new trial. The legal financial obligations imposed on an indigent defendant without an inquiry as to his ability to pay should be stricken.

Respectfully submitted this 3rd day of June 2016.

/s Mick Woynarowski

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 74036-9-I
v.)	
)	
CHRISTOPHER LOCKEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ISLAND COUNTY PROSECUTOR'S OFFICE P.O. BOX 5000 COUPEVILLE, WA 98239	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF JUNE, 2016.

X _____


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