

No. 44704-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Silverio Santiago,

Appellant.

Kitsap County Superior Court Cause No. 12-1-01165-4

The Honorable Judge Leila Mills

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Santiago's conviction violated his Sixth and Fourteenth Amendment right to confront witnesses.
2. Mr. Santiago's conviction violated his confrontation right under art. I, § 22.
3. The trial court infringed Mr. Santiago's confrontation rights by restricting cross-examination of a critical state witness.
4. The trial court should have allowed Mr. Santiago to inquire into M.M.'s prior inconsistent statements.
5. The trial court should have allowed Mr. Santiago to inquire into the possibility that M.M. confused his alleged offense with two other events that she had described using nearly identical language.

ISSUE 1: An accused person has the constitutional right to confront adverse witnesses. Here, the trial court restricted cross-examination regarding M.M.'s prior inconsistent statements and the possibility that she'd confused Mr. Santiago's alleged offense with two other events that she had described using nearly identical language. Did the restriction on cross-examination violate Mr. Santiago's confrontation rights under the Sixth and Fourteenth Amendments and Wash. Const. art. I, § 22?

6. The prosecutor committed misconduct that was flagrant and ill-intentioned.
7. The prosecutor committed misconduct that infringed Mr. Santiago's Fourteenth Amendment right to due process.
8. The prosecutor committed misconduct by shifting the burden of proof.
9. The prosecutor committed misconduct by undermining the presumption of innocence.
10. The prosecutor committed misconduct by asking jurors to hold Mr. Santiago to his burden.

11. The prosecutor committed misconduct by arguing that the presumption of innocence did not require jurors to presume Mr. Santiago told the truth when he denied committing the offense.
12. The prosecutor committed misconduct by suggesting jurors could acquit only if they believed M.M. lied in her testimony.

ISSUE 2: A prosecutor commits misconduct by shifting the burden of proof and undermining the presumption of innocence. Here the prosecutor asked jurors to hold Mr. Santiago to his burden, argued that they should not presume Mr. Santiago told the truth when he denied the offense, and suggested that jurors could acquit only by finding that M.M. lied in her testimony. Did the prosecutor commit misconduct that was flagrant and ill-intentioned in violation of Mr. Santiago's Fourteenth Amendment right to due process?

13. The prosecutor committed misconduct by suggesting that evidence that Francisco Santiago had intercourse with M.M. could be used to convict Silverio Santiago.
14. The prosecutor committed misconduct by relying on a specific instance of conduct to establish M.M.'s character for truthfulness.

ISSUE 3: Where defendants are joined for trial, due process requires jurors to decide each defendant's case separately. Here, the prosecutor implied that jurors could use M.M.'s truthful accusation against Francisco Santiago as proof that she told the truth when she alleged that she had intercourse with Silverio Santiago. Did the prosecutor commit misconduct by conflating the two cases and by arguing that one specific instance of conduct established M.M.'s character for truthfulness?

15. Mr. Santiago's conviction violated his Fourteenth Amendment right to due process.
16. Mr. Santiago's conviction was based on insufficient evidence.
17. The prosecution failed to prove that Mr. Santiago had sexual contact with M.M. that was more than kissing but less than intercourse.

ISSUE 4: A conviction for child molestation requires proof that the accused person had sexual contact with the alleged victim beyond kissing. Here, the jury did not agree that Mr. Santiago had intercourse with M.M., and the only other evidence of sexual contact consisted of testimony that the two had kissed. Was the evidence insufficient to prove child molestation beyond a reasonable doubt?

18. The trial court erred by imposing attorney fees in the amount of \$1135.
19. The trial court erred by finding that Mr. Santiago had the ability or likely future ability to pay his legal financial obligations.
20. The imposition of attorney fees violated Mr. Santiago's Sixth and Fourteenth Amendment right to counsel.

ISSUE 5: 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 \$1,135 in attorney fees despite the absence of evidence supporting a finding that Mr. Santiago had the ability or likely future ability to pay his financial obligations. Did the trial court violate Mr. Santiago's Sixth and Fourteenth Amendment right to counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Silverio Santiago has dated S.M.¹ for several years. RP (2/27/13) 186. S.M. has a younger sister named M.M. RP (2/27/13) 186. In 2011, M.M. had a crush on Mr. Santiago. RP (2/27/13) 187. She frequently told him that she loved him and called him “baby.” RP (2/27/13) 188.

In 2011, Mr. Santiago and S.M. separated for several months. RP (2/27/13) 187. During that time, Mr. Santiago and M.M. sent each other text messages about her sister. RP (2/27/13) 188.

On one occasion, M.M. invited Mr. Santiago over to the house and he went. RP (2/28/13) 250. The two started kissing and removed some clothing. RP (2/28/13) 250. Mr. Santiago thought better of having intercourse with M.M. and ended the encounter. RP (2/28/13) 250.

M.M. was fourteen years old when she and a friend starting bragging to each other about the older men they’d had sex with. RP (2/27/13) 197. Later, M.M.’s friend got angry with her. The friend told M.M.’s mother about their conversation. RP (2/27/13) 197.

When M.M.’s mother confronted her, she admitted she’d slept with an older man. She told her mother his name was Armando, and they’d had

¹ S.M. is an adult, but she will be referenced in this brief by initials to protect the name of her sister, M.M., who is a minor.

sex in June of 2012. RP (2/26/13) 15. When her mother confronted her again the next day, M.M. said that she'd also had sex with Francisco Santiago – Mr. Santiago's brother – in August of 2011.² RP (2/27/13) 198. After that, she told her aunt that she'd also had sex with Silverio Santiago. RP (2/27/13) 198.

M.M. had an interview with the sexual assault unit. RP (2/25/13) 16. She described the three sexual encounters using nearly identical language. RP (2/26/13) 63-65. She said that each incident began with kissing. RP (2/26/13) 63-64. Then she said each of the men asked her if she wanted to have sex and she replied "sure" or "yeah." RP (2/26/13) 63-64. She said that each of the men took a condom out of his wallet and put it on. RP (2/26/13) 63-64. She said that, each time, she took her pants off but did not remove any other clothing. RP (2/26/13) 63-64. She said that each of the men pulled his pants down but did not take them off. RP (2/26/13) 63-64. She said that she did not know if any of the men had ejaculated. RP (2/26/13) 63-64. When each encounter was over, M.M. did not talk to any of the men about it afterwards or ever again. RP (2/26/13) 63-64.

² This brief will refer to Silverio Santiago as Mr. Santiago; when the brother is mentioned, it will always be with his full name.

Francisco Santiago admitted to having intercourse with M.M. At the time, he thought she was older. RP (2/28/13) 265-66, 270.³

The state charged both Silverio and Francisco Santiago with rape of a child in the third degree and child molestation in the third degree. CP 1-3. The brothers were tried jointly. RP (1/07/13) 4.

At trial, both brothers sought to introduce evidence that M.M. had initially reported intercourse with Armando, and had not mentioned either of them. RP (2/25/13) 14-32. Mr. Santiago also wanted to elicit testimony about M.M.'s almost identical descriptions of the three sexual encounters. RP (2/25/13) 14-15. The court ruled that the rape shield statute did not apply because the incident with Armando was not "prior sexual conduct." RP (2/26/13) 55. Nonetheless, the court excluded the evidence, ruling that it was more prejudicial than probative. RP (2/26/13) 56-57.

At trial, M.M. testified that she and Mr. Santiago kissed and then she removed her pants. RP (2/27/13) 159-60, 191. She said that they engaged in intercourse, which she described as "his dick went in my vagina." RP (2/27/13) 160-61. M.M. did not testify to any other sexual contact with Mr. Santiago. RP (2/27/13) 159-62. On cross-examination,

³ Francisco Santiago believed that M.M. was eighteen based on the age she had listed on her FaceBook profile. RP (2/28/13) 266.

she confirmed there was “just kissing” and intercourse. RP (2/27/13) 192-93.

The prosecutor began his closing argument by telling the jury that:

... the presumption of innocence... isn't the same as the presumption of truthfulness or the presumption of honesty or the presumption of credibility.
RP (2/28/13) 324.

The prosecutor used a PowerPoint slideshow during closing.

Closing PowerPoint, Supp CP. In the slides, the prosecutor asked the jury to “Hold the defense to it’s [sic] burden.” Closing PowerPoint, Slide 42, Supp. CP.⁴ The prosecutor argued that Mr. Santiago wanted the jury to believe that M.M. was being dishonest. Closing PowerPoint, Slide 15, Supp. CP. The prosecutor urged the jury to judge the case on its merits, which the prosecutor described as “do you think she made it up?” Closing PowerPoint, Slide 22, Supp. CP. Another slide asked the jury “who do you trust is telling the truth?” Closing PowerPoint, Slide 43, Supp. CP.

Finally, the prosecutor argued that:

We know Francisco had sex with her. We know she was telling the truth about that. Why she would come and make this up about Silverio, I don't know.
RP (2/28/13) 373.

⁴ Francisco Santiago’s case raised the affirmative defense that he reasonably believed that M.M. was at least 16 based on her affirmative representation of her age on Facebook. RP (2/28/13) 266. The prosecutor failed to differentiate that case from Silverio Santiago’s case, which did not raise an affirmative defense. Closing PowerPoint, Slide 42, Supp. CP.

After a day and a half of deliberation, the jury was unable to reach a verdict for either count against Francisco Santiago. RP (3/4/13) 9. The jury was also hung on Mr. Santiago's rape of a child charge. RP (3/4/13) 9. It found Mr. Santiago guilty of child molestation. CP 4.

At sentencing, Mr. Santiago told the court that he would not be able to pay legal financial obligations. RP (3/29/13) 11. Nonetheless, the court found that he had the present or future ability to pay. CP 9. The court ordered Mr. Santiago to pay \$1135 in fees for his court-appointed attorney. CP 9.

Mr. Santiago was sentenced to six months and ordered to register as a sex offender. CP 5; RP (3/29/13) 19. This timely appeal follows. CP 14-24.

ARGUMENT

I. THE COURT VIOLATED MR. SANTIAGO'S STATE AND FEDERAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

A. Standard of Review.

Courts review *de novo* a denial of the right to confrontation. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010) (Jones I). Such an

error requires reversal unless the state can show that it was harmless beyond a reasonable doubt. *Id.* at 724.⁵

B. An accused person has the right to introduce relevant evidence and to confront adverse witnesses.

An accused person has a constitutional right to confront her or his accuser. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22. The primary and most crucial aspect of confrontation is the right to conduct meaningful cross-examination of adverse witnesses *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). The purpose of cross-examination is:

...to test the perception, memory, and credibility of witnesses. Confrontation therefore helps assure the accuracy of the fact-finding process. Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded.

Darden, 145 Wn.2d at 620 (citations omitted).

Where credibility is at issue, the defense must have wide latitude in cross-examination. *State v. York*, 28 Wn. App. 33, 621 P.2d 784 (1980).

The only limitations on the right to confront adverse witnesses are (1) that the evidence sought must be relevant and (2) that the right to admit the

⁵ Manifest error affecting a constitutional right may be raised for the first time on appeal RAP 2.5(a)(3).

evidence “must be balanced against the State’s interest in precluding evidence so prejudicial as to disrupt the fairness of the trial.” *Darden*, 145 Wn.2d at 621.

Evidence is relevant if it has “any tendency” to make a consequential fact more or less probable. ER 401. The threshold to admit relevant evidence is so low that even minimally relevant evidence is admissible unless the state can show a compelling interest to exclude it. *Darden*, 145 Wn.2d at 621; *see also* ER 401, ER 402.

Relevant evidence can be excluded if the court finds that its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. But where evidence is highly probative, no state interest can be compelling enough to preclude its introduction. *Jones I*, 168 Wn.2d at 721.

Evidence tending to establish the defendant’s theory of the case or to disprove the state’s theory is highly probative. *Jones I*, 168 Wn.2d at 721. The more crucial a witness is to the state’s case, the more latitude the court should afford the accused to cross-examine. *Darden*, 145 Wn.3d at 619. The accused must be permitted to cross-examine key witnesses regarding “fundamental elements such as motive, bias, credibility, or foundational matters.” *Darden*, 145 Wn.2d at 619.

Evidence of a witness's prior inconsistent statement is admissible for impeachment purposes. ER 613; *State v. Clinkenbeard*, 130 Wn. App. 552, 569, 123 P.3d 872, 881 (2005).

The court should not consider the impact of admission of past sexual behavior on the alleged victim when assessing its probative value under ER 403. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). Rather, "the integrity of the truthfinding process and defendant's right to a fair trial... should be the factors considered by the trial court in exercising its discretion to admit or exclude the evidence." *Id.*

C. The court limited Mr. Santiago's cross-examination of M.M. in violation of his Sixth and Fourteenth Amendment rights.

The trial court impermissibly precluded Mr. Santiago from asking M.M. (and other state witnesses) about Armando. M.M.'s initial disclosure to her mother included an accusation against Armando, but she did not mention Silverio Santiago or his brother Francisco Santiago. RP (2/25/13) 17-18.

In addition, she spoke of her encounter with Armando using language nearly identical to the language she used to describe the incidents with Silverio and Francisco Santiago.⁶ *Darden*, 145 Wn.2d at

⁶ The instance with Armando took place about a year after M.M. claimed to have had sex with Mr. Santiago. RP (2/25/13) 25. As noted by the trial court, the rape shield

619; *Jones I*, 168 Wn.2d at 721. This raised the possibility that she had confused her encounter with Mr. Santiago with the two other incidents. Counsel could also have argued that she relied on the incident with Armando and fabricated her alleged encounter with Mr. Santiago.

The trial court ruled that evidence of the third encounter would be more prejudicial than probative under ER 403. RP (2/26/13) 56-57. Neither the court nor the prosecutor explained what the prejudicial effect of the evidence would have been. RP (2/26/13) 56. Nor did the court explain why a limiting instruction would have been ineffective.

The evidence Mr. Santiago sought to admit was more probative than prejudicial. *Jones I*, 168 Wn.2d at 724. The testimony may have exacerbated M.M.'s embarrassment, the impact on M.M. was not a proper reason to exclude the evidence. *Hudlow*, 99 Wn.2d at 14. Rather, the court must assess prejudice to the state based only on whether the evidence would have enhanced the "truthfinding process." *Id.*

Here, the fact that M.M. described each instance almost identically was relevant to her credibility. Her rote use of the same language and facts demonstrated that she could have been describing a single incident three times. Mr. Santiago needed evidence of the third encounter to show

statute does not apply to this case because the evidence Mr. Santiago offered did not relate to *past* sexual behavior. RP (2/26/13) 55; RCW 9A.44.020(2); *Jones I*, 168 Wn.2d at 722.

that the similarity of her allegations against him and his brother was more than a coincidence.

M.M.'s failure to mention Silverio and Francisco Santiago when confronted by her mother should have been admitted as a prior inconsistent statement. She named Armando, but did not accuse either of the two brothers. The prejudicial effect of this impeachment evidence did not outweigh its probative value. *Jones I*, 168 Wn.2d at 724.

The court denied Mr. Santiago's right to confront the witnesses against him by impermissibly limiting his cross-examination of M.M.. *Darden*, 145 Wn.2d at 620. The state cannot show that this constitutional error was harmless beyond a reasonable doubt. *Jones I*, 168 Wn.2d at 724. Mr. Santiago's conviction must be reversed. *Id.*

II. PROSECUTORIAL MISCONDUCT DENIED MR. SANTIAGO A FAIR TRIAL.

A. Standard of Review.

A prosecutor commits misconduct by making improper statements that prejudice the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Absent an objection, a court can consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *Id.* A reviewing court analyzes the prosecutor's statements during closing in the context of the case as a

whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008)

(Jones II).

- B. The prosecutor committed misconduct that undermined Mr. Santiago's presumption of innocence, encouraged the jury to convict based on evidence against his brother, and improperly bolstered M.M.'s credibility.

Prosecutorial misconduct can deprive the accused of a fair trial.

Glasmann, 175 Wn.2d at 703-04; U.S. Const. Amends. VI, XIV, Wash.

Const. art. I, § 22. To determine whether a prosecutor's misconduct

warrants reversal, the court looks at its prejudicial nature and cumulative

effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

A prosecutor's improper statements prejudice the accused if they create a

substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d

at 704. The inquiry must look to the misconduct and its impact, not the

evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly

prejudicial because of the risk that the jury will lend it special weight "not

only because of the prestige associated with the prosecutor's office but

also because of the fact-finding facilities presumably available to the

office." Commentary to the *American Bar Association Standards for*

Criminal Justice std. 3-5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

Prosecutorial misconduct can be especially prejudicial in a case that turns entirely on the credibility of the accused and the alleged victim. *Boehning*, 127 Wn. App. at 523.

1. The prosecutor committed misconduct by asking the jury to “hold the defense to [its] burden.”

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3; *Glasmann*, 175 Wn.2d at 713 (citing *In re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). An accused person has no burden to present evidence in his/her defense. *State v. Johnson*, 158 Wn. App. 677, 684, 243 P.3d 936 (2010). It is misconduct for a prosecutor to misstate the law by shifting the burden of proof onto the accused. *Glasmann*, 175 Wn.2d at 713.

During closing argument in Mr. Santiago’s case, the prosecutor showed a PowerPoint slide asking jurors to “Hold the defense to it’s [sic] burden.” Closing PowerPoint, Slide 4, Supp CP.

Mr. Santiago’s codefendant presented an affirmative defense but Mr. Santiago did not. The prosecutor’s slide failed to differentiate between the two cases. Instead, the slide improperly suggested that Mr. Santiago had a burden and that they should hold him to it.

Mr. Santiago was prejudiced by the prosecutor's improper argument. *Glasmann*, 175 Wn.2d at 704. This case was a pure credibility contest. The jury heard no evidence other than M.M.'s testimony and Mr. Santiago's statement to the police. Mr. Santiago exercised his right not to testify at trial. RP (2/28/13) 293. If the jury erroneously believed that Mr. Santiago had a burden to prove his defense, they almost certainly believed that he had not met it. There is a substantial likelihood that the prosecutorial misconduct affected the verdict. *Id.*

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by shifting the burden of proof onto Mr. Santiago. *Glasmann*, 175 Wn.2d at 713. Mr. Santiago's conviction must be reversed. *Id.*

2. The prosecutor committed misconduct by making an argument undermining Mr. Santiago's presumption of innocence.

The presumption of innocence is the "bedrock upon which the criminal justice system stands." *State v. Evans*, 163 Wn. App. 635, 643, 260 P.3d 934 (2011). The presumption requires acquittal unless the jury is satisfied, after hearing all of the evidence and the instructions, that the state has proved a charge beyond a reasonable doubt. *Id.*

It is misconduct for a prosecutor to make arguments shifting the burden of proof onto the accused. *Johnson*, 158 Wn. App. at 684.

At Mr. Santiago's trial, the state's attorney argued that:

... the presumption of innocence... isn't the same as the presumption of truthfulness or the presumption of honesty or the presumption of credibility.
RP (2/28/13) 324.

This is incorrect.

When the accused makes a statement denying wrongdoing and continues to maintain his innocence, the presumption of innocence necessarily equates to a presumption that he told the truth. The two are equivalent. The presumption of innocence requires the jury to presume the accused person spoke honestly.

Of course, the presumption of innocence and the presumption that the accused spoke the truth can be overcome. This principle of due process is explained to the jury in the instruction outlining the state's burden. The presumption of innocence—and hence the presumption of the accused person's truthfulness—“continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.” CP 52. *Evans*, 163 Wn. App. at 643.

Mr. Santiago told police that he did not have intercourse with M.M. He maintained his innocence at trial. Accordingly, the presumption of innocence required jurors to presume that he spoke the truth. The

prosecutor's statement mischaracterized the law by arguing that the jury did not have to presume Mr. Santiago's claim of innocence was true.

The prosecutor's improper argument prejudiced Mr. Santiago. *Glasmann*, 175 Wn.2d at 704. The jury was required to acquit if it had any reasonable doubt as to the veracity of M.M.'s testimony. The prosecutor's arguments undermined the state's burden, by suggesting that jurors were not required to presume that Mr. Santiago told the truth.

The misconduct was especially egregious, given the prosecutor's other misconduct: asking jurors to hold the defense to its burden, relying on a specific instance of conduct to bolster M.M.'s credibility, and suggesting that jurors had to believe M.M. lied in order to acquit Mr. Silverio. There is a substantial likelihood that the prosecutor's misconduct affected the verdict. *Id.*

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by mischaracterizing the law of the presumption of innocence. *Johnson*, 158 Wn. App. at 684. Mr. Santiago's conviction must be reversed. *Id.*

3. The prosecutor committed misconduct by encouraging the jury to convict Mr. Santiago based on the evidence against his brother.

It is misconduct for a prosecutor to improperly bolster the credibility of the state's witnesses. *Boehning*, 127 Wn. App. at 514. A

prosecutor also commits misconduct by encouraging the jury to make legally impermissible inferences. *Boehning*, 127 Wn. App. at 521.

Evidence of an alleged victim's character is not admissible to prove conformity therewith on a particular occasion. ER 404.

Mr. Santiago's jury was instructed that:

... You must separately decide each count charged against each defendant. Your verdict on one count as to one defendant should not control your verdict on any other count or as to any other defendant.
CP 54.

Nonetheless, the prosecutor argued that the jury should convict Mr. Santiago based on the evidence against his brother:

We know Francisco had sex with her. We know she was telling the truth about that. Why she would come and make this up about Silverio, I don't know.
RP (2/28/13) 373.

The prosecutor's argument improperly bolstered M.M.'s credibility. *Boehning*, 127 Wn. App. at 514. It also encouraged the jury to convict Mr. Santiago based on the evidence against his brother, who had admitted to having intercourse with M.M. Evidence of M.M.'s character for truthfulness was not admissible to show conformity therewith on a particular occasion. ER 404.

Mr. Santiago was prejudiced by the prosecutor's improper remarks. *Glasmann*, 175 Wn.2d at 704. M.M.'s credibility was the

primary factual issue in the case. The state impermissibly argued that the jury should find M.M. credible based on improper character evidence and the codefendant's admission to having intercourse with her. There is a substantial likelihood that the prosecutor's misconduct affected the verdict. *Id.*

The prosecutor committed flagrant, ill-intentioned, and prejudicial misconduct by improperly bolstering M.M.'s credibility with evidence against Mr. Santiago's codefendant. *Boehning*, 127 Wn. App. at 514. Mr. Santiago's conviction must be reversed. *Id.*

4. The prosecutor committed misconduct by arguing that the jury had to think M.M. was lying in order to acquit Mr. Santiago.

It is misconduct for a prosecutor to mischaracterize the burden of proof by arguing that the jury must find that the state's witnesses are lying in order to acquit. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); *Glasmann*, 175 Wn.2d at 713. Rather than being required to convict unless it finds that the alleged victim is lying, the jury is required to acquit unless it has an abiding belief in the truth of her testimony. *Fleming*, 83 Wn. App. at 213.

An improper argument claiming that the jury is required to convict unless it finds that the alleged victim is lying is particularly prejudicial when the accused does not testify. *Id.* at 214.

At Mr. Santiago's trial, the prosecutor argued that the jury should weigh M.M.'s version of events against Mr. Santiago's and convict unless it found that M.M. was lying. RP (2/28/13) 374; Closing PowerPoint, Supp CP. In a PowerPoint presentation, the state's attorney argued that Mr. Santiago wanted the jury to believe that M.M. was being dishonest. Closing PowerPoint. Slide 15, Supp. CP. He told the jury to judge Mr. Santiago's case "on its merits," which he explained as "Do you think [M.M.] made it up?" Closing PowerPoint, Slide 22, Supp. CP. At the end of the presentation, the prosecutor asked the jury to decide the case based on "who do you trust is telling the truth?" Closing PowerPoint, Slide 43, Supp. CP. The state also argued that there was no motivation for M.M. to lie. RP (2/28/13) 374.

The overall effect of the prosecutor's arguments was to inform the jury that it had to convict Mr. Santiago unless it found that M.M. was lying. This argument mischaracterized the state's burden of proof. *Fleming*, 83 Wn. App. at 213.

Mr. Santiago was prejudiced by the prosecutor's improper arguments. *Glasmann*, 175 Wn.2d at 704. The prejudicial effect was amplified because Mr. Santiago exercised his right not to testify. *Fleming*, 83 Wn. App. at 213. M.M.'s credibility was the primary factual issue for the jury. The state argued that the jury had a duty to convict unless it

found that she was lying. There is a substantial likelihood that the prosecutor's misconduct affected the verdict. *Glasmann*, 175 Wn.2d at 704.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by arguing that the jury was required to convict Mr. Santiago unless it found that M.M. was lying. *Fleming*, 83 Wn. App. at 213. Mr. Santiago's conviction must be reversed. *Id.*

C. The cumulative effect of the prosecutor's misconduct requires reversal of Mr. Santiago's conviction.

The cumulative effect of repeated instances prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

The prosecutor in Mr. Santiago's case committed multiple instances of flagrant and ill-intentioned misconduct. These included asking the jury to "hold the defense to it's [sic] burden," undermining the presumption of Mr. Santiago's innocence, arguing that evidence of the codefendant's guilt was a reason to convict, and saying that the jury had to believe M.M. was lying to acquit.

All of these instances of misconduct, whether considered individually or in the aggregate, require reversal of Mr. Santiago's conviction. *Id.*

III. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. SANTIAGO OF CHILD MOLESTATION.

A. Standard of Review.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

B. No rational jury could have found beyond a reasonable doubt that Mr. Santiago had sexual contact short of intercourse.

A conviction for child molestation in the third degree must be reversed if the state presented insufficient evidence that the accused had "sexual contact" with the alleged victim. RCW 9A.44.089(1); *State v. R.P.*, 122 Wn.2d 735, 736, 862 P.2d 127 (1993). "Sexual contact" means:

any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.010(2). Evidence of kissing alone is not sufficient to prove sexual contact. *R.P.*, 122 Wn.2d at 736.

Here, the evidence was insufficient for conviction.

M.M. testified that she and Mr. Santiago kissed and then engaged in intercourse, which she described as “his dick went in my vagina.” RP (2/27/13) 159-61, 191. M.M. did not testify to any other sexual contact with Mr. Santiago. RP (2/27/13) 159-62. The jury did not agree that Mr. Santiago had intercourse with M.M.⁷ *Id.* Thus its verdict rested on evidence that the two had kissed. RP (2/27/13) 159-61, 191. This evidence cannot sustain the verdict. *R.P.*, 122 Wn.2d at 736.

The trial court should have granted Mr. Santiago’s post-trial motion for arrest of judgment. The trial court’s erroneous decision rested on an incorrect recollection of the testimony and a misunderstanding of the law. RP (3/29/13) 8; CP 67-69. The court mistakenly believed that Mr. Santiago had admitted to kissing M.M. and taking off her clothes.

This was error for two reasons. First, kissing alone does not qualify as sexual contact. *R.P.*, 122 Wn.2d at 736. The trial judge should not have relied on testimony about kissing as a basis to sustain the conviction.

⁷ The jury was unable to reach a verdict on Mr. Santiago’s rape charge. RP (3/4/13) 9. The jury was instructed that it had a duty to convict Mr. Santiago of that charge if it found beyond a reasonable doubt that he had sexual intercourse with M.M.. CP 62. The jury is presumed to have followed that instruction. *State v. Dye*, --- Wn.2d ---, 309 P.3d 1192, 1200 (Sept. 26, 2013).

Second, Mr. Santiago did not say he'd removed M.M.'s clothes. RP (2/28/13) 249-50. Rather Mr. Santiago merely said that he and M.M. "ended up naked" but that he decided not to have sex with her. RP (2/28/13) 250.

No rational jury could have found beyond a reasonable doubt that Mr. Santiago engaged in sexual contact with M.M. short of intercourse. *Chouinard*, 169 Wn. App. at 899. Mr. Santiago's conviction must be reversed. *Id.*

IV. THE COURT ORDERED MR. SANTIAGO TO PAY THE COST OF HIS COURT-APPOINTED ATTORNEY IN VIOLATION OF HIS RIGHT TO COUNSEL.

A. Standard of Review.

Reviewing courts assess questions of law and constitutional challenges *de novo*. *State v. Jones*, No. 41902-5-II, 2013 WL 2407119, --- P.3d --- (June 4, 2013) (Jones III); *State v. Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (Sept. 19, 2013).

The court violated Mr. Santiago's right to counsel by ordering him to pay the cost of his court-appointed attorney without first determining that he had the 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.

RCWA 10.01.160(3).

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.⁸ *Fuller*, 417 U.S. at 45.

⁸ 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 obligation requires disclosure before counsel is appointed.

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 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 hold that the Sixth Amendment requires a court to find that the accused has the present or future ability to repay the cost of court-appointed counsel before ordering him/her to do so. *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 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.

B. The record does not support the sentencing court's finding that Mr. Santiago has the ability or likely future ability to pay his legal financial obligations.

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011).

In this case, the sentencing court entered such a finding without any support in the record. RP (3/29/13) 11-16; CP 9. Indeed, the record suggests that Mr. Santiago lacks the ability to pay the amount ordered. The lower court found Mr. Santiago indigent at the end of the proceedings. CP 25-26. At sentencing, Mr. Santiago informed the court that he would be unable to pay legal financial obligations. RP (3/29/13) 11. The court did not respond to this assertion before ordering him to pay the cost of his public defender. RP (3/29/13) 11-16; CP 9. His lengthy incarceration and felony conviction will also negatively impact his prospects for

employment. Accordingly, Finding No. 4.1 of the Judgment and Sentence must be vacated. *Id.*

The lower court ordered Mr. Santiago to pay \$1135 in fees for his court-appointed attorney without conducting any inquiry into his present or future ability to pay. CP 9; RP (3/29/13) 2-19.

The court violated Mr. Hernandez's right to counsel. Under *Fuller*, it 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. Santiago to pay \$1135 in attorney fees must be vacated. *Id.*

CONCLUSION

The trial court violated Mr. Santiago's constitutional rights to present a defense and to confront adverse witnesses when it impermissibly limited his cross-examination of the alleged victim. The prosecutor committed numerous instances of flagrant, ill-intentioned, prejudicial misconduct. There was insufficient evidence for a rational trier of fact to find Mr. Santiago guilty of child molestation but not of rape of a child. Mr. Santiago's conviction must be reversed.

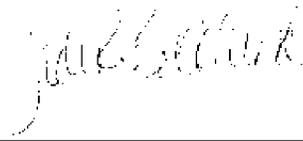
In the alternative, the court violated Mr. Santiago's right to counsel when it ordered him to pay the cost of his court-appointed attorney

without first assessing whether he had the present or future ability to pay.

The order that Mr. Santiago pay attorney's fees must be vacated.

Respectfully submitted on November 14, 2013,

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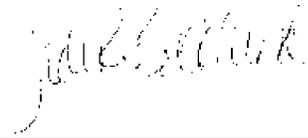
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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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 November 14, 2013.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

November 14, 2013 - 11:20 AM

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