

No. 46292-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Nathan Austin,

Appellant.

Pierce County Superior Court Cause No. 13-1-04710-3

The Honorable Judge Stephanie Arend

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Austin was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Defense counsel provided ineffective assistance by failing to object to inadmissible evidence that Mr. Austin had been in rehab prior to the alleged offenses.
3. Defense counsel should have objected under ER 403 to evidence that Mr. Austin had been in rehab.
4. Defense counsel should have objected under ER 404(b) to evidence that Mr. Austin had been in rehab.
5. Defense counsel should have objected under ER 403 to evidence that Mr. Austin had been in rehab.
6. Evidence that Mr. Austin had been in rehab permitted a propensity inference in violation of his Fourteenth Amendment right to due process.

ISSUE 1: Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid tactical reason. Here, Mr. Austin's attorney waived objection to evidence that Mr. Austin had been in rehab prior to the current drug charge. Was Mr. Austin denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

7. Mr. Austin's conviction violated his Fourteenth Amendment right to due process because it was based in part on inadmissible evidence showing that he was a particularly dangerous person.
8. Evidence singling Mr. Austin out as particularly dangerous violated his Sixth and Fourteenth Amendment right to a fair trial by an impartial jury.

ISSUE 2: Evidence singling the accused out as particularly dangerous violates the right to a fair trial and undermines the presumption of innocence. Here, even though Mr. Austin was

unarmed and cooperative, the state introduced evidence that police conducted a “high risk” stop of Mr. Austin’s vehicle, that such stops usually involved guns, and that Mr. Austin had to be handcuffed to prevent him from accessing weapons. Did testimony making Mr. Austin appear particularly dangerous violate his Sixth and Fourteenth Amendment right to a fair trial by an impartial jury?

9. The order imposing \$1500 in attorney fees violated Mr. Austin’s Sixth and Fourteenth Amendment right to counsel.
10. The trial court erred by imposing attorney fees in the absence of any evidence showing that Mr. Austin had the present or likely future ability to pay.
11. The court erred by adopting Finding of Fact No. 2.5 in the Judgment and Sentence.

ISSUE 3: A trial court may only order an offender to pay attorney fees upon finding that s/he has the present or likely future ability to pay. Here, the court imposed \$1500 in costs for court-appointed counsel without any evidence that Mr. Austin had the ability to pay them. Did the trial court violate Mr. Austin’s Sixth and Fourteenth Amendment right to counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Paul Siskin drove his car, with his friend Nathan Austin riding along. RP (3/5/14) 80. Siskin realized that he was drunk and asked Mr. Austin to drive. RP (3/5/14) 80. Mr. Austin drove the rest of the way to the Emerald Queen Casino. RP (3/5/14) 80.

Upon arriving at the casino, Mr. Austin and Siskin were separated. RP (3/5/14) 80. Mr. Austin looked for Siskin but was not able to find him. RP (3/5/14) 80. Eventually, Mr. Austin left with Siskin's car. He drove around the area where he knew Siskin lived but was not able to find him or his home. RP (3/5/14) 80.

For several days, Mr. Austin drove the car around the area, looking for Siskin so he could return the car. RP (3/4/14) 19. Eventually, Mr. Austin went back to the casino to look for Siskin. RP (3/4/14) 19. He walked around the casino floor, but was not able to find him. PR (3/5/14) 80.

When Mr. Austin walked back to the car in the casino parking lot, he was arrested. RP (3/5/14) 74. Siskin's mother – the registered owner of the car – had reported it stolen. RP (3/5/14) 95. Mr. Austin was surprised to hear that the police thought the car was stolen. RP (3/5/14)

79. Mr. Austin had the keys to the car, which was completely undamaged. RP (3/5/14) 89, 98.

A search revealed a very small amount of methamphetamine in Mr. Austin's coat pocket. RP (3/5/14) 83, 130.

The state charged Mr. Austin with possession of a stolen vehicle, taking of a motor vehicle without permission in the second degree, and possession of a controlled substance. CP 1-2. The jury eventually acquitted him of possession of a stolen vehicle. RP (3/6/14) 169.

At trial, the officer who arrested Mr. Austin testified that the stop was "high risk." RP (3/5/14) 76. The court overruled Mr. Austin's objection to the testimony. RP (3/5/14) 76. The officer said that he requested backup because, in cases involving stolen cars, "we know from our training and experience that there is usually guns involved in there, and it is a pretty dangerous situation just to be alone." RP (3/5/14) 76. He said that he placed Mr. Austin in handcuffs to make sure he was secure and did not have access to weapons. RP (3/5/14) 78.

The officers did not actually find any weapons in the car or on Mr. Austin's person. RP (3/5/14) 68-92.

Siskin testified that he had met Mr. Austin in rehab. RP (3/5/14) 101. Defense counsel did not object to that testimony. RP (3/5/14) 101.

Siskin said that he had never driven in the car with Mr. Austin. RP (3/5/14) 102. He said that he lost the keys in the casino one night and that the car was missing from the parking lot the next day. RP (3/5/14) 100-01.

Siskin admitted that his mother would have been angry if he had loaned the car to Mr. Austin. RP (3/5/14) 108. He also acknowledged that he did not want to make his mother upset. RP (3/5/14) 108.

The jury convicted Mr. Austin of taking of a motor vehicle and possession of a controlled substance. At sentencing, Mr. Austin pointed out that he was indigent and asked the court to waive non-mandatory legal financial obligations. RP (5/9/14) 8. Still, the court ordered him to pay \$1,500 in fees for his court-appointed attorney. CP 52.

This timely appeal follows. CP 80-95.

ARGUMENT

I. MR. AUSTIN WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a).

An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). Reversal is required if counsel's deficient performance prejudices the accused. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

B. Defense counsel provided ineffective assistance by failing to object to inadmissible evidence that Mr. Austin had been in rehab.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland*, 466 US at 685.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

Defense counsel provides ineffective assistance by failing to object to inadmissible evidence absent a valid strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). Reversal is required if an objection would likely have been sustained and there is a reasonable probability that the result of the trial would have been different without the inadmissible evidence. *Id.*

The use of propensity evidence to prove a crime may violate due process under the Fourteenth Amendment.¹ U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds* at 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993).² A conviction based in part on propensity evidence is not the result of a fair trial. *Garceau*, 275 F.3d at 776, 777-778; *see also Old Chief v. United States*, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

In addition to constitutional limitations, the rules of evidence prohibit the introduction of propensity evidence. Under ER 404(b),

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

ER 404(b) must be read in conjunction with ER 403, which requires that probative value be balanced against the danger of unfair prejudice.³ *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

¹ The U.S. Supreme Court has expressly reserved ruling on a similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

² Washington courts are not bound by decisions of the federal circuit courts. *In re Crace*, 157 Wn. App. 81, 98 n. 7, 236 P.3d 914 (2010) *reversed on other grounds*, 174 Wn.2d 835, 280 P.3d 1102 (2012). However, decisions of the federal courts of appeal can provide guidance to Washington courts as they interpret the Fourteenth Amendment's due process clause.

³ ER 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

A trial court must begin with the presumption that evidence of prior bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). When the state seeks to introduce evidence of prior “bad acts,” it bears the “substantial” burden of showing admission is appropriate for a purpose other than propensity. *State v. DeVincentis*, 150 Wn.2d 11, 19, 74 P.3d 119 (2003).

Here, defense counsel provided ineffective assistance by failing to object when Siskin testified that Mr. Austin had been in rehab prior to the current alleged offenses. RP (3/5/14) 101. In this drug case, the information that Mr. Austin had been to rehab amounted to inadmissible propensity evidence. It encouraged the jury to find that he was more likely to have possessed drugs. It also permitted the inference that he was more likely to have taken the car because he was a drug addict. The evidence was not relevant to any element of Mr. Austin’s charges. The evidence was inadmissible under ER 403 and ER 404(b).

Defense counsel had no valid tactical reason for waiving objection to the testimony that Mr. Austin had been to rehab. The information was not helpful to Mr. Austin’s theory of the case. Indeed, defense counsel

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

objected to the admission of the testimony that Mr. Austin had been in drug court. RP (3/4/14) 46. Defense counsel demonstrated that he did not have a strategy of admitting evidence regarding Mr. Austin's drug addiction. Mr. Austin's attorney provided deficient performance by failing to object to the evidence about rehab as well.

Mr. Austin was prejudiced by his attorney's deficient performance. *Saunders*, 91 Wn. App. at 578. The evidence painted him in an unnecessarily negative light. It also permitted a propensity inference related to the drug charge. The jury likely believed that a drug addict who had been drinking at a casino was more likely to be guilty. There is a reasonable probability that the result of Mr. Austin's trial would have been different absent the inadmissible evidence. *Id.*

Defense counsel provided ineffective assistance by failing to object to testimony that Mr. Austin had been in rehab prior to the current allegations. *Saunders*, 91 Wn. App. at 578. Mr. Austin's convictions must be reversed. *Id.*

II. OFFICER TESTIMONY VIOLATED MR. AUSTIN’S PRESUMPTION OF INNOCENCE BY SEEKING TO MAKE HIM APPEAR PARTICULARLY DANGEROUS.

A. Standard of Review.

Violations of the right to an impartial jury are reviewed *de novo*. *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005). Manifest error affecting a constitutional right can be raised for the first time on appeal. RAP 2.5(a)(3).

B. Testimony that the police stop of Mr. Austin was “high risk” violated his right to a fair trial by an impartial jury.

An accused person is entitled to a fair trial by an impartial jury. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 3, 21, 22. *Gonzalez*, 129 Wn. App. at 900. This right includes the right to the presumption of innocence. *Gonzalez*, 129 Wn. App. at 900. The constitutional presumption of innocence is the bedrock foundation of any criminal trial. *Id.* (citing *Morissette v. United States*, 342 U.S. 246, 275, 72 S.Ct. 240, 96 L.Ed. 288 (1952)). It is the court’s duty to give effect to the presumption of innocence by “being alert to any factor that could undermine the fairness of the fact-finding process.” *Gonzalez*, 129 Wn. App. at 900 (citing *Estelle*, 425 U.S. at 503).

Measures suggesting that the accused is particularly dangerous threaten the right to a fair trial. *State v. Jaime*, 168 Wn.2d 857, 862, 233 P.3d 554 (2010). Such practices undermine the presumption of innocence and are inherently prejudicial. *Id.* Whether a courtroom event has negatively affected the presumption of innocence receives “close judicial scrutiny.” *Gonzalez*, 129 Wn. App. at 900-01 (*citing Estelle*, 425 U.S. at 504; *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955)). The analysis looks to “reason, principle, and common human experience.” *Estelle*, 425 U.S. at 504.

Here, a police officer testified that Mr. Austin’s circumstances warranted a “high risk” stop. RP (3/5/14) 76. Over Mr. Austin’s objection, the officer testified that such stops are very dangerous and usually involve guns. RP (3/5/14) 76. He said that he handcuffed Mr. Austin in order to be secure and to make sure that Mr. Austin did not have access to weapons. RP (3/5/14) 78.

This testimony undermined the presumption of Mr. Austin’s innocence by singling him out as particularly dangerous. *Jaime*, 168 Wn.2d at 862. The officers’ opinion of the risk Mr. Austin posed was not relevant to the charges and created a danger of unfair prejudice. ER 403; *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671, 230 P.3d 583 (2010).

Testimony painting Mr. Austin as particularly dangerous violated his right to a fair trial by undermining the presumption of innocence. *Jaime*, 168 Wn.2d at 862. This error requires reversal of Mr. Austin's convictions and remand for a new trial. *Id.*

III. THE COURT ERRED BY ORDERING MR. AUSTIN TO PAY ATTORNEY'S FEES IN A MANNER THAT IMPERMISSIBLY CHILLS THE EXERCISE OF THE RIGHT TO COUNSEL.

A. Standard of Review.

Reviewing courts assess constitutional issues and questions of law *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013); *State v. Jones*, 175 Wn. App. 87, 95, 303 P.3d 1084 (2013).

B. The court violated Mr. Austin's right to counsel by ordering him to pay the cost of his court-appointed attorney without first considering his present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Under *Fuller*, the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

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

RCW 10.01.160(3) (emphasis added).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.⁴ *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay

⁴ 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.

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.

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).

Here, Mr. Austin asked the court to waive any non-mandatory legal financial obligations. RP (5/9/14) 8. He pointed out that he was indigent. RP (5/9/14) 8. Even so, the court did not consider any information relevant to whether Mr. Austin had the ability to pay the cost of his court-appointed attorney. RP (5/9/14) 2-15. Although the court made a finding that Mr. Austin “has the ability or likely future ability to pay [] legal financial obligations,”⁵ this finding is not supported by anything in the record. Indeed, the court also found Mr. Austin indigent at the end of the proceedings. CP 96-98. Mr. Austin’s felony convictions and incarceration will further negatively impact his prospects for employment.

The trial court ordered Mr. Austin to pay \$1,500 in attorney fees. CP 52. This violated his right to counsel. Under *Fuller*, the court lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had the ability to do so. *Fuller*, 417 U.S. at

53. The order requiring Mr. Austin to pay attorney fees must be vacated.

Id.

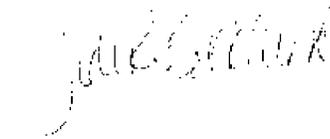
CONCLUSION

Mr. Austin's defense counsel provided ineffective assistance by failing to object to inadmissible propensity evidence. Testimony singling Mr. Austin out as particularly dangerous violated his right to a fair trial by undermining the presumption of innocence. Mr. Austin's convictions must be reversed.

In the alternative, the court violated Mr. Austin's right to counsel by imposing attorney's fees in a manner that impermissibly chills the exercise of that right. The order for Mr. Austin to pay \$1,500 in attorney's fees must be vacated.

Respectfully submitted on November 3, 2014.

BACKLUND AND MISTRY



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⁵ CP 51-52.



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CERTIFICATE OF SERVICE

I certify that on today's date:

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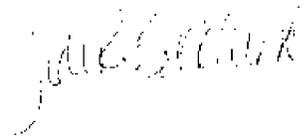
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 3, 2014.



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BACKLUND & MISTRY

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Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

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