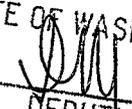


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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jamason Tedder,

Appellant.

Cowlitz County Superior Court Cause No. 14-1-00274-0

The Honorable Judge Michael H. Evans

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Tedder was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Defense counsel unreasonably failed to object to un-proved and un-charged allegations that Mr. Tedder had raped Sage.
3. Sage's "rape" allegations were inadmissible under ER 404(b).
4. The court erred by failing to conduct the required inquiry under ER 404(b) on the record before admitting evidence of un-proved, un-charged allegations.

ISSUE 1: Defense counsel provides ineffective assistance by failing to object to prejudicial inadmissible evidence. Did counsel deny Mr. Tedder effective assistance by failing to object to allegations that he'd raped Sage, when the prosecutor agreed that his actions did not amount to rape?

5. Defense counsel provided ineffective assistance by unreasonably failing to object to extensive inadmissible hearsay recounting Sage's version of events.

ISSUE 2: To be effective, defense counsel must object to prejudicial hearsay that does not fit within a hearsay exception. Did counsel provide ineffective assistance by permitting two officers to repeat Sage's hearsay claims in detail?

6. Prosecutorial misconduct deprived Mr. Tedder of his Sixth and Fourteenth Amendment right to a fair trial.
7. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by "testifying" to "facts" not in evidence during closing argument.

ISSUE 3: A prosecutor commits misconduct by "testifying" to "facts" not in evidence. Did the prosecutor commit misconduct by attributing statements to Mr. Tedder that were not in evidence and that made it appear as though Mr. Tedder's had admitted to many of the allegations?

8. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by minimizing and mischaracterizing the state's burden of proof during closing argument.

ISSUE 4: A prosecutor commits misconduct by minimizing or mischaracterizing the state's burden of proof to the jury. Did the prosecutor commit misconduct by telling jurors they could convict if their "head, hearts, and guts" said that Mr. Tedder "did it"?

9. The court miscalculated Mr. Tedder's offender score.
10. The court abused its discretion by failing to consider whether Mr. Tedder's assault and harassment convictions constituted the same criminal conduct.
11. If the same criminal conduct issue is not preserved for review, then Mr. Tedder received ineffective assistance of counsel.

ISSUE 5: Two offenses are the same criminal conduct if committed at the same time and place, against the same victim, with the same criminal objective. Should the court have found the assault and harassment convictions were the same criminal conduct where all crimes were part of "one big scheme" undertaken with a single intent as part of one course of conduct against the same victim?

ISSUE 6: Defense counsel provides ineffective assistance by unreasonably failing to point out that two offenses are the same criminal conduct. If Mr. Tedder's same-criminal-conduct claim is waived, did counsel provide ineffective assistance at sentencing?

12. The court erred by ordering Mr. Tedder to pay \$2,125 in legal financial obligations absent any inquiry into whether he had the means to do so.
13. The court erred by entering finding of fact 2.5. CP 78

ISSUE 7: A court may not order a person with significant mental health diagnoses to pay legal financial obligations (LFOs) without conducting an individualized inquiry into his/her means to do so. Did the court err by ordering Mr. Tedder to pay \$2,125 in LFOs without analyzing whether he

had the money to pay, when he was on a fixed income as a result of his significant mental illness?

14. The trial court erred by giving Instruction No. 2.
15. The trial court's reasonable doubt instruction violated Mr. Tedder's right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3.
16. The trial court's reasonable doubt instruction violated Mr. Tedder's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21 and 22.
17. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.
18. The trial court's instruction improperly focused jurors on "the truth of the charge" rather than the reasonableness of their doubts.

ISSUE 8: A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with "an abiding belief in the truth of the charge," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Tedder's constitutional right to a jury trial?

ISSUE 9: A juror with reasonable doubt must acquit, even if unable to articulate a reason for the doubt. By defining a "reasonable doubt" as a doubt "for which a reason exists," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Tedder's constitutional right to a jury trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jamason Tedder and Dolly Sage lived together in a small apartment in downtown Longview. RP 78, 278. The apartment was above a bakery on a commercial strip. RP 130, 278, 289. There were two restaurants across the street. RP 130. The apartment building was a block and a half from the Longview Police Department (PD). RP 289.

On the evening Monday February 24th, 2014, Sage and Mr. Tedder walked together to Safeway and bought a few items. RP 99. They walked past the Longview PD on the way to and from the grocery store. RP 100, 154-155.

On Wednesday February 26, 2014, Mr. Tedder went alone to the Salvation Army to pick up a box of donated food. RP 352. He had to wait in two different lines to get the food. RP 352. The typical wait can take up to ninety minutes. RP 354.

Sometime during the week, Mr. Tedder also went to the home of a friend and neighbor to deliver groceries he had bought for her. RP 189-190.

On Saturday March 1st, Sage went to the police and said that Mr. Tedder had held her against her will in their apartment from Friday the 21st until Friday the 28th. RP 209-212.

The police asked Sage if either she or Mr. Tedder had left the apartment during that week and she said no. RP 212-213. She claimed that Mr. Tedder had threatened to kill her if she left the apartment and said he would hurt her with pliers, a belt, and a piece of a broken CD.¹ RP 208. She said that he had taken her three cell phones. RP 209.

Sage did not claim that Mr. Tedder had every physically bound or tethered her in any way. RP 76-179.

The state charged Mr. Tedder with second degree assault with a deadly weapon, unlawful imprisonment, and felony harassment. CP 1-3.

About a month before trial, defense counsel uncovered receipts from Mr. Tedder and Sage's trip to Safeway. RP 153. He also located records documenting that Mr. Tedder had picked up the food from the Salvation Army. RP 154.

After being confronted with that evidence, Sage finally admitted that she and Mr. Tedder had left the apartment together and that he had also left without her. RP 153-154.

She described the route they took to walk to Safeway, which included passing the Longview PD and an open mini-mart. RP 154-155.

¹ Sage also claimed that Mr. Tedder had thrown her to the ground, dragged her by her hair, forced her to watch pornography, and asked her to explain every call and text message on her three cell phones. RP 208-212.

She did not claim that Mr. Tedder had any kind of weapon with him at the time. RP 154-155.

She said that she was awake when Mr. Tedder left for the Salvation Army but slept alone in the apartment while he was gone. RP 163. She reported that he was gone for anywhere from twenty to forty minutes. RP 159-160. She said she knew how long he would be gone when he left. RP 102. She said that she knew where the Salvation Army was located and that it was further from the apartment than the Longview police station. RP 158.

Mr. Tedder and Sage had sexual intercourse during the week of her supposed confinement. RP 2. The prosecutor explained that Mr. Tedder was not charged with rape because there was no evidence that Sage resisted or indicated that she did not consent. RP 2.

The prosecutor conceded that Mr. Tedder had not committed sexual assault "as the law is currently written." RP 2. Instead, she said that Sage "in her mind... was not willing." RP 2.

Even so, Sage, her friend, and a sexual assault nurse all testified repeatedly that Mr. Tedder had raped Sage during the week. RP 91, 148, 154, 184, 336, 341. At one point, defense counsel asked Sage about having sex with Mr. Tedder and she insisted in front of the jury that they had not had sex, but that she had been raped. RP 148.

Defense counsel did not move *in limine* to preclude witnesses from characterizing the sexual contact as rape. Nor did counsel object to any of the testimony regarding the alleged rapes.

Sage's testimony spanned two days of trial. RP 76-179. Then her friend recounted the entire story again, telling jurors what Sage had told her about the allegations. RP 184-186.

After that, two police officers repeated Sage's story in detail as she had told it to them during an interview at the police station, one day after she'd left the apartment. RP 208-212; 250-254. Defense counsel did not object to the hearsay. RP 208-212; 250-254.

In closing argument, the prosecutor attributed the following statements to Mr. Tedder:

'Demonstrate for me how much you love me. Don't just say it, even though I threaten you, don't just say. I'm going to make you show it.' And he has sex with her. And she doesn't want to have sex but she doesn't fight back.
RP 443.

The prosecutor also asked the jury: "What does your head, heart, and guts say[?] If it says he did it, you're convinced beyond a reasonable doubt." RP 470.

The court's reasonable doubt instruction included language that: "A reasonable doubt is one for which a reason exists..." CP 38. The court also instructed jurors that they were convinced of guilt beyond a

reasonable doubt if they had “an abiding belief in the truth of the charge.”

CP 38.

The jury convicted Mr. Tedder of all three charges. RP 484.

At sentencing, the court found that the offenses were all “part in (sic) parcel of one big scheme.” RP 499. The judge found that the assault and harassment offenses were both committed with the intent to keep Sage in the apartment. RP 499. The court scored the assault and unlawful imprisonment convictions as the same criminal conduct. The court also scored the harassment and unlawful imprisonment convictions as the same criminal conduct. RP 499; CP 76. But the court scored the assault and harassment convictions against each other, and did not find they comprised the same criminal conduct. CP 76.

Mr. Tedder lives on SSI benefits as a result of his mental health diagnoses. WSH Report, Supp. CP; RP 509. The court found him indigent for purposes of appeal. CP 86-87. Still, the court ordered him to pay \$2,125 in legal financial obligations (LFOs) in addition to any restitution that may have been ordered in the future. CP 80. The court did not inquire into Mr. Tedder’s ability to pay LFOs at sentencing. RP 489-511.

This timely appeal follows. CP 85.

ARGUMENT

I. DEFENSE COUNSEL UNREASONABLY FAILED TO OBJECT TO INADMISSIBLE AND PREJUDICIAL EVIDENCE.²

A. Counsel should have objected to inaccurate testimony regarding un-charged allegations that Mr. Tedder “raped” Sage.

Mr. Tedder was not charged with rape. CP 1-3. This was because there was no allegation that he forced Sage to have sex with him or that she expressed a lack of consent. RP 2. The prosecutor told the court that Mr. Tedder did not commit rape “as the law is currently written” but that “in [Sage’s] mind that was not willing.” RP 2.

Without any objection, Sage, McNeil, and the SANE nurse all testified repeatedly that Mr. Tedder had raped Sage throughout the week.³ RP 91, 148, 154, 184, 336, 341. In fact, when defense counsel asked Sage about having sex with Mr. Tedder, she insisted that they had not had sex, but that she had been raped. RP 147-148. Counsel still did not object to any of the testimony about “rape.” RP 91, 148, 154, 184, 336, 341.

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

³ Nor did counsel move *in limine* to prevent witnesses from characterizing any sexual contact as rape.

Mr. Tedder's attorney provided ineffective assistance⁴ by failing to object to the extensive testimony of inaccurate and un-charged allegation of "rape." *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007). The evidence was not admissible under ER 404(b) and was highly prejudicial.

A failure to object constitutes deficient performance when counsel has no valid tactical reason to waive objection. *Hendrickson*, 138 Wn. App. at 833. Counsel had no reason to waive objection in this case.

When analyzing evidence of uncharged misconduct, a trial court must begin with the presumption that the evidence 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). The burden is on the state to overcome this presumption. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014). Here, the state did not overcome the presumption that Sage's un-charged "rape" allegations were inadmissible.

Before admitting misconduct evidence, the court must find by a preponderance that the misconduct actually occurred. *Slocum*, 183 Wn. App. at 448. The court made no such finding in this case. RP 2.

⁴ An accused person had the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Kyllo*, 166 Wn.2d at 862.

Indeed, such a finding would have been impossible given the state's admission that Mr. Tedder's actions did not fit the legal definition of rape. Because a preponderance of the evidence did not demonstrate that Mr. Tedder actually raped Sage, the evidence should have been excluded. *Id.*

The court must also identify a proper purpose for the evidence. *Id.* Here, the prosecutor argued that the rape allegations were relevant to Sage's state of mind for the unlawful imprisonment charge. RP 2. But unlawful imprisonment does not have an element related to the alleged victim's state of mind. *See* RCW 9A.40.040; RCW 9A.40.010(6). Neither the state nor the court identified any other proper purpose for the evidence.⁵ RP 2.

Before admitting evidence of prior misconduct, the court must determine its relevance to prove an element of the offense. *Slocum*, 333 P.3d at 546. Sage's uncharged rape allegations were not relevant to any element of assault, harassment, or unlawful imprisonment.

⁵ The evidence was also not admissible as *res gestae* of the offenses with which Mr. Tedder was charged. *Res gestae* or "same transaction" evidence can be admissible to "complete the story of the crime." *State v. Mutchler*, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989). Such evidence must compose "inseparable parts of the whole deed or criminal scheme." *Id.* *Res gestae* evidence involving other crimes or bad acts, however, must still meet the requirements of ER 404(b). *Id.*

As outlined herein, Sage's rape allegations do not meet the other admissibility requirements of ER 404(b), particularly because Mr. Tedder had not actually raped her. The evidence was also not necessary to "complete the story of the crime." Even if the

Finally, the court must weigh the probative value of the evidence against its prejudicial effect. *Id.* The trial court failed to do so here. Had the court done the necessary balancing, it would have found that the uncharged rape allegations were far more prejudicial than probative. The word rape is highly inflammatory, and the evidence had no bearing on whether Mr. Tedder was more likely guilty of his charged offenses.

All the steps outlined above must be performed on the record, and doubtful cases are resolved in favor of exclusion. *McCreven*, 170 Wn. App. at 458; *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Here, the court failed to perform the required analysis on the record. RP 2.

Even if evidence of intercourse had been admissible, it could have been easily sanitized by a defense objection to the use of the word “rape.” Such an objection would likely have been sustained given the state’s agreement that Mr. Tedder’s actions did not fit the legal definition of rape.

Sage’s rape allegations were not admissible. Counsel had no valid tactical reason for permitting the evidence. Its admission made Mr. Tedder appear more violent. A reasonable defense attorney would have objected. Mr. Tedder’s lawyer provided deficient performance by failing to do so. *Hendrickson*, 138 Wn. App. at 833.

state felt that the jury needed to know about the intercourse between Mr. Tedder and Sage

Mr. Tedder was prejudiced by his attorney's deficient performance.⁶ *Kyllo*, 166 Wn.2d at 862. The jury had serious reason to doubt Sage's credibility. But the repeated testimony regarding rape -- some of which came from a nurse specializing in sexual assault -- made Mr. Tedder appear much more violent. Given the testimony, the jury was more likely to want to find Mr. Tedder guilty of some offense. There is a reasonable probability that counsel's unreasonable failure to object affected the outcome of Mr. Tedder's trial. *Kyllo*, 166 Wn.2d at 862.

Mr. Tedder's attorney provided ineffective assistance of counsel by unreasonably failing to object to extensive improper evidence that he had raped Sage. *Hendrickson*, 138 Wn. App. at 833; *Kyllo*, 166 Wn.2d at 862. Mr. Tedder's convictions must be reversed. *Id.*

B. A reasonable defense attorney would have objected to protracted hearsay repetition of Sage's allegations by almost every state witness.

Sage was the state's first witness. Over the course of two days, she testified to a detailed account of her allegations against Mr. Tedder. RP 76-179.

Then, former Officer Nick Wells repeated Sage's claims to the jury, based on her account during a police interview. RP 208-212. Wells

during the week, that testimony could have been elicited without using the word "rape."

used much of the same detail to describe the alleged ordeal in the apartment. RP 208-212.

Next, Officer Shelton described the same interview with Sage. RP 250-253. He again repeated what Sage had said during the interview. RP 250-253.

Mr. Tedder's attorney did not object to this extensive hearsay. RP 208-212; 250-253.

Jurors should not have been subjected to these additional repetitions of Sage's account. The evidence was inadmissible hearsay and should have been excluded under ER 802. Even if admissible, it was needlessly cumulative under ER 403.

Counsel should have objected, and the hearsay should have been excluded. Jurors could not help but be influenced by repeated exposure to Sage's account, as relayed through professional witnesses.

No one told the jury that repetition is not a valid test of veracity.

See State v. Purdom, 106 Wn.2d 745, 750, 725 P.2d 622 (1986).⁷ Each

⁶ Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Kyllo*, 166 Wn.2d at 862.

⁷ The sole exception to this rule arises when the proponent of a prior consistent statement shows "that the witness's prior consistent statement was made *before* the witness's motive to fabricate arose." *State v. Thomas*, 150 Wn.2d 821, 865, 83 P.3d 970 (2004). Mr. Tedder never implied that external pressure arising since her interviews with police and the nurse provided Sage a motive to fabricate her testimony. Thus the evidence would not have been admissible under ER 801(d)(1)(ii).

repetition of Sage's account strengthened the jurors' perceptions of her credibility. This prejudiced Mr. Tedder by making conviction more likely.

Indeed, the Supreme Court has recognized the risk that a jury will place "undue emphasis" on testimony that it hears more than once. *State v. Koontz*, 145 Wn.2d 650, 654, 41 P.3d 475 (2002).

Here, both officers repeated Sage's allegations, exposing the jury to her account a total of four times.⁸ The hearsay testimony served no purpose except to reinforce and emphasize Sage's version of events in the minds of the jurors.

The evidence against Mr. Tedder was not overwhelming. Sage's lies to the police—that neither she nor Mr. Tedder had left the apartment—may have provided reasonable doubt had the jury not also been improperly exposed to all of the ways in which her prior statements coincided with her testimony. There is a reasonable probability that counsel's failure to object to the lengthy inadmissible hearsay affected the outcome of Mr. Tedder's trial. *Kyllo*, 166 Wn.2d at 862.

Mr. Tedder was deprived of effective assistance by his attorney's failure to object to the repeated introduction of inadmissible hearsay repetition of the allegations against him. *Kyllo*, 166 Wn.2d at 862. His convictions must be reversed and the case remanded for a new trial. *Id.*

II. PROSECUTORIAL MISCONDUCT DENIED MR. TEDDER A FAIR TRIAL

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. In this case, the prosecutor committed misconduct that deprived Mr. Tedder of a fair trial. Specifically, the prosecutor “testified” to “facts” that were not in evidence, and mischaracterized the burden of proof.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight. *Glasmann*, 175 Wn.2d at 706. The misconduct here occurred during closing.

- A. The prosecutor committed misconduct by fabricating statements and attributing them to Mr. Tedder in closing.

In closing argument, the prosecutor attributed these statements to Mr. Tedder: “demonstrate for me how much you love me. Don’t just say it, even though I threaten you, don’t just say. I’m going to make you show it.” RP 442-43. The prosecutor then claimed that Mr. Tedder had sex with Sage against her will. RP 443.

⁸ Including her own testimony and that of the nurse.

But no witness testified that Mr. Tedder ever said anything along those lines. The prosecutor committed misconduct by manufacturing the statements and ascribing them to Mr. Tedder in an effort to make him look more sinister, and to make it appear as though he had admitted to an overarching plan to control Sage.

A prosecutor commits misconduct by urging a jury to consider “facts” that have not been admitted into evidence. *Glasmann*, 175 Wn. 2d at 705. It is, likewise, misconduct for a prosecutor to fabricate statements and attribute them to the accused in closing argument. *State v. Pierce*, 169 Wn. App. 533, 554, 280 P.3d 1158 (2012).

Here, the prosecutor did just that. The prosecutor’s arguments were improper. *Id.*

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.

Given the “fact-finding facilities presumably available” to the prosecutor’s office, the jury likely took the prosecutor’s statements at face value. *Glasmann*, 175 Wn.2d at 706. There is a reasonable probability the jury believed that Mr. Tedder had actually said: “demonstrate for me how

much you love me... I'm going to make you show it" as the prosecutor claimed. RP 442-43.

There is also a reasonable probability that the prosecutor's improper argument affected the jury's verdict. *Glasmann*, 175 Wn.2d at 704. The jury had serious reason to doubt Sage's credibility. She directly lied to the police when asked if either she or Mr. Tedder left the apartment during the week of her supposed confinement. RP 212-213. Sage did not admit that she had lied until months later, when tangible evidence of the trips to Safeway and the Salvation Army came to light. RP 153-154.

The statements that the prosecutor attributed to Mr. Tedder made it appear as though he had admitted to an overarching plan to restrain and control Sage. RP 442-443. In the face of such an "admission" the jury would likely feel duty-bound to convict Mr. Tedder even if they did not believe Sage. Mr. Tedder was prejudiced by the prosecutor's improper argument. *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Pierce*, 169 Wn. App. at 552. Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707.

Here, the prosecutor had access to long-standing case law prohibiting the injection of “facts” not in evidence into closing argument. *See e.g. Id.; Pierce*, 169 Wn. App. at 553. The prosecutor’s closing encouraged jurors to doubt their own memories of Mr. Tedder’s statements in the apartment. The bell of this additional “evidence” would have been impossible to un-ring with a curative instruction. The prosecutor’s misconduct was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by distorting the evidence in closing argument and putting words into Mr. Tedder’s mouth that made him appear guilty. *Glasmann*, 175 Wn. 2d at 705; *Pierce*, 169 Wn. App. at 553. Mr. Tedder’s conviction must be reversed. *Id.*

B. The prosecutor minimized and misstated the state’s burden of proof in closing by telling the jury that they must convict Mr. Tedder if they felt he was guilty in their “hearts, heads, and guts.”

The prosecutor made the following statement during closing in Mr. Tedder’s trial: “What does your head, heart, and guts say? If it says he did it, you’re convinced beyond a reasonable doubt.” RP 470.

This argument drastically mischaracterized the state’s burden of proof and constituted flagrant, ill-intentioned, and prejudicial misconduct.

A prosecutor commits misconduct by minimizing the state's burden of proof to the jury. *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010) *review denied*, 171 Wn.2d 1013, 249 P.3d 1029 (2011).

Here, the prosecutor committed misconduct by mischaracterizing the state's burden to the jury. *Id.* Belief of guilt in one's "heart, head, and guts" is not the same as being convinced beyond a reasonable doubt. Indeed, a juror could believe in his/her heart, head, and guts that Mr. Tedder was guilty while still harboring a reasonable doubt based on the evidence or lack of evidence. The prosecutor's argument was improper. *Id.*

A prosecutor's misstatement of the state's burden of proof "constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Johnson*, 158 Wn. App. at 685-86.

Here, there is a substantial likelihood that the prosecutor's mischaracterization of the state's burden affected the outcome of Mr. Tedder's trial. *Glasmann*, 175 Wn.2d at 704. As outlined above, the evidence against Mr. Tedder was not overwhelming. Still, some jurors may have believed in their "hearts, heads, and guts" that he was guilty

even if they felt the state had not proved each element of each charge. Mr. Tedder was prejudiced by the prosecutor's improper argument.

Again, the prosecutor had access to established precedent prohibiting the kind of argument made in this case. *See e.g. Johnson*, 158 Wn. App. at 677, 685-86. The misconduct was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by minimizing the state's burden of proof in closing. *Johnson*, 158 Wn. App. at 677, 685-86. Mr. Tedder's convictions must be reversed. *Id.*

III. MR. TEDDER'S OFFENDER SCORE SHOULD HAVE BEEN ZERO BECAUSE ALL THREE OFFENSES COMPRISED THE SAME CRIMINAL CONDUCT.

The sentencing court ruled that Mr. Tedder's assault and harassment offenses were committed with the intent to keep Sage from leaving the apartment. RP 499. Accordingly, the court found that the assault and harassment were each the same criminal conduct as the unlawful imprisonment. According to the judge, all three crimes were "part in (sic) parcel of one big scheme." RP 499.

Still, the court did not score the assault and harassment offenses as the same criminal conduct as each other. Instead, the court scored them

separately and counted them against each other. CP 76. The court abused its discretion and miscalculated Mr. Tedder's offender score.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525.⁹ When calculating the offender score, a sentencing judge must determine how multiple current offenses are to be scored. Under RCW 9.94A.589(1)(a),

[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime... "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim...

RCW 9.94A.589(1)(a).

In determining whether multiple offenses require the same criminal intent, the sentencing court "should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next...." *State v. Garza-Villarreal*, 123 Wn.2d 42, 46-47, 864 P.2d 1378 (1993) (quoting *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)). A continuing, uninterrupted sequence of conduct may stem from a single overall criminal objective; simultaneity is not required. *State v.*

Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998); *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

Here, the court found that Mr. Tedder's three offenses were all part of "one big scheme." RP 499. The judge found that the intent was to keep Sage in the house, and that this was the purpose behind both the assault and the harassment charges. RP 499. The intent for the unlawful imprisonment charge was also to keep Sage in the house.

Accordingly, all three offenses had the same victim, took place at the same time, had the same intent, and constituted an uninterrupted sequence of events. All three offenses comprised the same criminal conduct and none of them should have scored against any of the others. *Id.*; RCW 9.94A.589(1)(a).

Because Mr. Tedder did not have any prior felony convictions, his offender score should have been zero. *See* CP 74.

A court's failure to exercise discretion is itself an abuse of discretion. *Brunson v. Pierce Cnty.*, 149 Wn. App. 855, 861, 205 P.3d 963 (2009). Here, the court did not consider whether all three of Mr. Tedder's convictions comprised the same criminal conduct despite opining on the record that they were all "part in parcel of one big scheme" with the same

⁹ An offender score calculation is reviewed *de novo*. *State v. Tewee*, 176 Wn. App. 964, 967, 309 P.3d 791 (2013). An illegal or erroneous sentence may be challenged for the first time on review. *State v. Hayes*, 177 Wn. App. 801, 312 P.3d 784 (2013).

criminal intent. RP 499. This failure to exercise discretion constitutes an abuse of discretion.¹⁰ *Id.*

Mr. Tedder's offender score should have been zero because all three of his offenses comprised the same criminal conduct. RCW 9.94A.589(1)(a). This case must be remanded for resentencing. *Id.*

IV. THE TRIAL COURT ERRED BY ORDERING MR. TEDDER TO PAY \$2,125 IN LEGAL FINANCIAL OBLIGATIONS WITHOUT INQUIRING INTO HIS ABILITY TO PAY AND DESPITE HIS SIGNIFICANT MENTAL HEALTH DIAGNOSES AND FIXED INCOME.

Mr. Tedder was found indigent at the end of trial. CP 86-87. He receives SSI benefits because of his significant mental health diagnoses. WSH Report, Supp. CP; RP 509. The court struck from the Judgment and Sentence language providing that Mr. Tedder had the present ability to pay the costs of his incarceration. RP 509; CP 78. Still, the court ordered him to pay \$2,125 in legal financial obligations (LFOs). CP 80.

¹⁰ Mr. Tedder's attorney argued that the assault and harassment convictions both comprised the same criminal conduct as the unlawful imprisonment. RP 494-497. Counsel did not stipulate that the assault and harassment were separate from distinct from each other. RP 494-497.

If this court finds that the same-criminal-conduct issue is waived, then Mr. Tedder's attorney's failure to raise the issue constituted ineffective assistance of counsel. *Strickland*, 466 U.S. at 685.

A. The court exceeded its authority under RCW 9.94A.777 by imposing LFOs.

The legislature has imposed obligations upon a trial court before it can order a person with a mental health condition to pay LFOs:

Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.

RCW 9.94A.777(1).¹¹

This language stands in contrast to that of other statutes permitting the imposition of LFOs upon anyone who has the present ability to pay *or* will be able to pay *in the future*. See e.g. RCW 10.01.160(3). In cases involving offender with mental health conditions, the court must find that s/he has the ability to pay at the time of sentencing. RCW 9.94A.777(1).

The requirement that a judge “must first determine” that the offender has the ability to pay also imposes a more concrete duty than RCW 10.01.160(3), which only requires the court to *consider* whether the person can pay. RCW 9.94A.777(1).

Here, the court knew that Mr. Tedder suffered from significant mental health conditions. WSH Report, Supp. CP; RP 501-504, 509. He

¹¹ For purposes of the statute, “mental health condition” is defined as: “a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant’s enrollment in a public

had been hospitalized for mental health reasons eighteen times; some of those stints lasting more than a year. WSH Report, Supp. CP. Mr. Tedder also received SSI benefits based on his mental health diagnoses. WSH Report, Supp. CP; RP 509.

Still, the court did not explicitly find that Mr. Tedder had the present means to pay LFOs before ordering him to pay \$2,125. RP 489-511. The court's order exceeded its authority under RCW 9.94A.777.

B. The court failed to make any particularized inquiry into Mr. Tedder's present or future ability to pay LFOs.

The court apparently relied on boilerplate language stating, essentially, that the court has considered every offender's ability to pay. CP 78. The court did not conduct any particularized inquiry into Mr. Tedder's financial situation at sentencing or at any other time.¹² RP 489-511.

The court erred by ordering Mr. Tedder to pay LFOs absent any indication that he had the means to do so.

The legislature has mandated that "[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them."

assistance program, a record of involuntary hospitalization, or by competent expert evaluation." RCW 9.94A.777(2).

¹² The court also failed to consider Mr. Tedder's mental illness, as required by statute. RP 489-511.

RCW 10.01.160(3); *State v. Blazina*, --- Wn.2d ---, 344 P.3d 680, 685 (March 12, 2015) (emphasis added by court).

This imperative language prohibits a trial court from ordering LFOs absent an individualized inquiry into the person's ability to pay. *Id.* Boilerplate language in the Judgment and Sentence is inadequate because it does not demonstrate that the court engaged in an individualized analysis. *Id.*

Furthermore, the court must consider personal factors such as incarceration and the person's other debts, including restitution. *Id.*

Here, the court failed to conduct any meaningful inquiry into Mr. Tedder's ability to pay LFOs. RP 489-511. The court did not consider his financial status in any way. Indeed, the court also found Mr. Tedder indigent shortly after imposing \$2,125 in LFOs. CP 86-87.

Had the court considered the factors mandated by the Supreme Court in *Blazina*, Mr. Tedder's incarceration and his receipt of SSI benefits would have weighed heavily against a finding that he had the ability to pay LFOs.

In fact, the *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* (“[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's

ability to pay LFOs”). GR 34 mandates that any person receiving SSI benefits – as Mr. Tedder does -- qualifies as indigent. *Comment* to GR 34.

RAP 2.5(a) permits an appellate court to review errors even when they are not raised in the trial court. RAP 2.5(a); *Blazina*, --- Wn.2d ---, 344 P.3d at 683. The *Blazina* court recently chose to review the LFO-related issue raised in this case, finding that “National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” *Id.*

The Supreme Court noted the significant disparities both nationally and in Washington in the administration of LFOs and the significant barriers they place to reentry of society. *Id.* at 683-85. This court should follow the Supreme Court’s lead and consider the merits of Mr. Tedder’s LFO claim even though it was not raised below.

The court erred by ordering Mr. Tedder to pay \$2,125 in LFOs absent any showing that he had the means to do so. *Blazina*, --- Wn.2d ---, 344 P.3d at 685. Furthermore, the imposition of LFOs is inappropriate, given Mr. Tedder’s significant mental health diagnoses. RCW 9.94A.777.

The order must be vacated and the case remanded for a new sentencing hearing. *Id.*

V. THE COURT’S “REASONABLE DOUBT” INSTRUCTION INFRINGED MR. TEDDER’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

C. The instruction improperly focused the jury on a search for “the truth.”

A jury’s role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). Here, the trial court instructed the jury that proof beyond a reasonable doubt means having “an abiding belief *in the truth of the charge*.” CP 75 (emphasis added).

Rather than determining the truth, a jury’s task “is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760. In this case, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider “the truth of the charge.” CP 75.¹³

A jury instruction misstating the reasonable doubt standard “is subject to automatic reversal without any showing of prejudice.” *Id.* at 757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Here, by equating proof beyond a reasonable doubt

¹³ Mr. Tedder does not challenge the phrase “abiding belief.” Both the U.S. and Washington Supreme Courts have already determined that phrase to be constitutional. See *Victor v. Nebraska*, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 439, 7 S.Ct. 614, 30 L.Ed. 708 (1887)); *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995). Rather, Mr. Tedder objects to the instruction’s focus on “the truth.” CP 75.

with a “belief in the truth of the charge,” the court confused the critical role of the jury. CP 75.

The court’s instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor’s misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 75. Jurors were obligated to follow the instruction. CP 75.

The presumption of innocence can be “diluted and even washed away” by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated.¹⁴ *Id.*

Improper instruction on the reasonable doubt standard is structural error. *Sullivan*, 508 U.S. at 281-82. By equating that standard with “belief in the truth of the charge” the court misstated the prosecution’s burden of proof, confused the jury’s role, and denied Mr. Tedder his constitutional right to a jury trial.¹⁵

¹⁴ Although the *Bennett* court approved WPIC 4.01, the court was not faced with a challenge to the “truth” language in that instruction. *Id.*

¹⁵ U.S. Const. Amends. VI, XIV; art. I, §§ 3, 21, 22.

Mr. Tedder's convictions must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

D. The instruction diverted the jury's attention away from the reasonableness of any doubt, and erroneously focused it on whether jurors could provide a reason for any doubts.

1. Jurors need not articulate a reason for doubt in order to acquit.

Due process requires the state to prove each element of a charged offense beyond a reasonable doubt. U.S. Const. Amend. XIV; art. I, § 3; *Sullivan*, 508 U.S. 275; *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Jury instructions must clearly communicate this burden to the jury. *Bennett*, 161 Wn.2d at 307 (citing *Victor*, 511 U.S. at 5-6).

Instructions that relieve the state of its burden violate due process and the Sixth Amendment right to trial by jury. U.S. Const. Amends. VI; XIV; *Sullivan*, 508 U.S. at 278-81; *Bennett*, 161 Wn.2d at 307. An instruction that misdirects the jury as to its duty "vitiates *all* the jury's findings." *Sullivan*, 508 U.S. at 279-281.

Jurors need not articulate a reason for their doubt before they can vote to acquit. *Emery*, 174 Wn.2d at 759-60 (addressing prosecutorial misconduct). Language suggesting jurors must be able to articulate a

reason for their doubt is “inappropriate” because it “subtly shifts the burden to the defense.” *Emery*, 174 Wn.2d at 759-60.¹⁶

Requiring articulation “skews the deliberation process in favor of the state by suggesting that those with doubts must perform certain actions in the jury room—actions that many individuals find difficult or intimidating—before they may vote to acquit...” *Humphrey v. Cain*, 120 F.3d 526, 531 (5th Cir. 1997) *on reh'g en banc*, 138 F.3d 552 (5th Cir. 1998).¹⁷ An instruction imposing an articulation requirement “creates a lower standard of proof than due process requires.” *Id.*, at 534.¹⁸

2. The trial court erroneously told jurors to convict unless they had a doubt “for which a reason exists.”

The trial court instructed jurors that “A reasonable doubt is one for which a reason exists.” CP 75. This suggested to the jury that it could not acquit unless it could find a doubt “for which a reason exists.” CP 75. This instruction – based on WPIC 4.01 – imposes an articulation requirement that violates the constitution.

¹⁶See also *State v. Walker*, 164 Wn. App. 724, 731-732, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 175 Wn. 2d 1022, 295 P.3d 728 (2012); *Johnson*, 158 Wn. App. at 684-86.

¹⁷The Fifth Circuit decided *Humphrey* before enactment of the AEDPA. Subsequent cases applied the AEDPA’s strict procedural limitations to avoid the issue. *See, e.g., Williams v. Cain*, 229 F.3d 468, 476 (5th Cir. 2000).

¹⁸In *Humphrey*, the court addressed an instruction containing numerous errors, including an articulation requirement. Specifically, the instruction defined reasonable doubt as “a serious doubt, for which you can give a good reason.” *Humphrey*, 120 F.3d at 530.

A “reasonable doubt” is not the same as a reason to doubt.

“Reasonable” means “being in agreement with right thinking or right judgment: not conflicting with reason: not absurd: not ridiculous. . . being or remaining within the bounds of reason... Rational.” *Webster’s Third New Int’l Dictionary* (Merriam-Webster, 1993). A reasonable doubt is thus one that is rational, is not absurd or ridiculous, is within the bounds of reason, and does not conflict with reason. *Accord Jackson v. Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (“A ‘reasonable doubt,’ at a minimum, is one based upon ‘reason.’”); *Johnson v. Louisiana*, 406 U.S. 356, 360, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (collecting cases defining reasonable doubt as one “‘based on reason which arises from the evidence or lack of evidence’” (quoting *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2d Cir. 1965))).

The “a” before “reason” in Instruction No. 3 inappropriately alters and augments the definition of reasonable doubt. CP 75. “[A] reason” is “an expression or statement offered as an explanation of a belief or assertion or as a justification.” *Webster’s Third New Int’l Dictionary*. The phrase “a reason” indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable

doubt—one for which a reason exists, rather than one that is merely reasonable.

This language requires more than just a reasonable doubt to acquit. *Cf. In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt.”) Jurors applying Instruction No. 3 could have a reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable.¹⁹ For example, a case might present such voluminous and contradictory evidence that jurors with reasonable doubts would struggle putting their doubts into words or pointing to a specific, discrete reason for doubt. Despite reasonable doubt, acquittal would not be an option under Instruction No. 3, if jurors couldn’t put their doubts into words. CP 75.

As a matter of law, the jury is “firmly presumed” to have followed the court’s reasonable doubt instruction. *Diaz v. State*, 175 Wn.2d 457, 474-475, 285 P.3d 873 (2012). The instruction here left jurors with no choice but to convict unless they had a reason for their doubts. This meant Mr. Tedder couldn’t be acquitted, even if jurors had a reasonable doubt.

¹⁹See Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1213-14 (2003).

The instruction “subtly shift[ed] the burden to the defense.” *Emery*, 174 Wn.2d at 759-60. It also “create[d] a lower standard of proof than due process requires...” *Humphrey*, 120 F.3d at 534. By relieving the state of its constitutional burden of proof, the court’s instruction violated Mr. Tedder’s right to due process and his right to a jury trial. *Id.*; *Sullivan*, 508 U.S. at 278-81; *Bennett*, 161 Wn.2d at 307. Accordingly, his convictions must be reversed and the case remanded for a new trial with proper instructions. *Sullivan*, 508 U.S. at 278-82.

CONCLUSION

Defense counsel provided ineffective assistance by failing to object to inaccurate and un-charged “rape” allegations as well as extensive prejudicial hearsay. The prosecutor committed misconduct by fabricating statements and putting them in Mr. Tedder’s mouth as well as by minimizing the state’s burden of proof to the jury. Mr. Tedder’s convictions must be reversed.

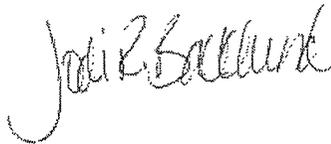
In the alternative, the court abused its discretion by failing to score Mr. Tedder’s assault and harassment convictions as the same criminal conduct. The court also erred by ordering Mr. Tedder to pay \$2,125 in

legal financial obligations without any inquiry into his ability to do so.

Mr. Tedder's case must be remanded for resentencing.

Respectfully submitted on May 6, 2015,

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CERTIFICATE OF MAILING

I certify that on today's date:

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

Jamason Tedder, DOC #378534
Monroe Corrections Center
PO Box 777
Monroe, WA 98272

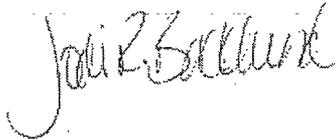
And to:

Cowlitz County Prosecuting Attorney
Benton County District Attorney's Office
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Corvallis OR 97330

I mailed the Appellant's Opening Brief to the Court of Appeals, Division II.

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 May 6, 2015.



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