

**NO. 47246-5-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**ADAM RAMBUR,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court's refusal to allow the defense to elicit evidence that the defendant had qualified his admission that he had restrained his girlfriend denied the defendant a fair trial

2. Trial counsel's failure to endorse a claim of self defense on the charge of unlawful imprisonment denied the defendant effective assistance of counsel.

3. The trial court's refusal to grant a mistrial after the prosecutor told the jury during rebuttal that she personally believed one deputy's version of events denied the defendant a fair trial.

4. The trial court erred when it imposed legal financial obligations upon an indigent defendant without assessing the defendant's ability to pay.

*Issues Pertaining to Assignment of Error*

1. In a trial on a charge of unlawful imprisonment does a trial court's refusal to allow a defendant to elicit evidence that the defendant had qualified an admission to the police involving the restraint of other person deny that defendant a fair trial if the state first elicits evidence of the admission without eliciting evidence of the qualification?

2. Does a trial counsel's failure to endorse a claim of self defense on the charge of unlawful imprisonment deny a defendant effective assistance of counsel when the evidence supports that claim and when there was no other defense?

3. Does a trial court's refusal to grant a mistrial after a prosecutor tells the jury during rebuttal that she personally believed a police officer's testimony over that of the complaining witness deny that defendant a fair trial?

4. Does a trial court err if it imposes legal financial obligations upon an indigent defendant without assessing that defendant's ability to pay?

## STATEMENT OF THE CASE

### *Factual History*

At about 7:30 pm on September 7, 2014, Lewis County Deputy Susan Shannon was working routine patrol when she was dispatched to a domestic dispute at 211 Riffe Hill Road in Morton, Washington, following a 911 call placed by Sara Cypher, who lives at that residence. CP 147-148.<sup>1</sup> According to police dispatch, during the 911 call Ms Cypher claimed that during an argument her boyfriend Adam Rambur had pinned her to the floor, restrained her arms with his hands to the point she thought he would break her wrists, slapped her, placed his arm across her throat to the point that she could not breathe, had threatened to kill her with a hammer, and had threatened to harm her dog. RP 147-148, 163-165; Identification No. 1; Exhibits 8, 10. Dispatch also reported that Ms Cypher claimed that the defendant had walked outside into the woods wearing just his pajama bottoms. *Id.* Once at the house in Morton, Deputy Shannon waited a few minutes for Deputy Jeff Humphrey to arrive as backup. RP 147.

When Deputy Humphrey arrived, he and Deputy Shannon walked onto the back deck of the residence where they encountered Ms Cypher. RP

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<sup>1</sup>The record on appeal includes three volumes of continuously number verbatim reports of the jury trial and sentencing hearing held in this case. They are referred to herein as “RP [page #].”

148, 164-166. They both noticed that she was crying and upset and repeatedly stated that she wanted to go in the residence because she was fearful and that she wanted the deputies to find the defendant and take him away. *Id.* She also repeated the claims she had made during the 911 call, including her claim that the defendant had slapped her and had pushed on her neck with his forearm to the point that he had interfered with her breathing. RP 155-156, 165-168. Although the deputies saw marks on Ms Cypher's wrists and arms consistent with her claim of restraint, they didn't see any marks on her neck consistent with having been slapped or strangled. RP 149.

During this process Deputy Humphrey walked to the edge of the forest and repeatedly called for the defendant to surrender to them. RP 169. The defendant did not respond to these orders. *Id.* Eventually Deputy Shannon retrieved a recorder to tape Ms Cypher's statement and a camera to get pictures of her injuries. RP 156-157, 169. However, Ms Cypher refused to either give a statement or allow herself to be photographed once Deputy Humphrey told her that they would take the defendant to jail once they found him. *Id.* This information upset Ms Cypher because she only wanted the defendant "taken away," not arrested and taken to jail. RP 97.

Eventually Ms Cypher reentered the house and the deputies waited for a canine officer to arrive. RP 157-158. Once he arrived and got his dog out of his patrol vehicle the dog began to bark loudly. *Id.* In response the

defendant walked out of the woods from his hiding place and the deputies arrested him. *Id.* Upon questioning the defendant denied slapping Ms Cypher, strangling her or threatening to kill her. RP 158-160. He did admit sitting atop her and holding her wrists, but he claimed that he only did this to keep her from attacking him or destroying his property. *Id.*; see also Identification No. 1.

### ***Procedural History***

By information filed on September 8, 2014, and later amended three times the Lewis County Prosecutor charged the defendant Adam Rambur with one count of second degree assault by strangulation or suffocation, one count of unlawful imprisonment, one count of felony harassment, and one count of bail jumping from a class B or C felony. CP 1-4, 20-22, 25, 28, 32-34. The prosecutor added the last charge after the defendant failed to appear at a court ordered hearing following his arraignment. CP 20-22. This case later came to trial before a jury with the state calling three witnesses: Sara Cypher, Deputy Shannon and Deputy Humphrey. CP 55, 145, 163. The two deputies testified to the facts set out in the preceding factual history. *See* Factual History, *supra*. However, Ms Cypher did not. *Id.* The following examines her testimony at trial.

According to Ms Cypher's testimony at trial, on the day in question she awoke in the afternoon in a very bad mood, precipitated by the fact that

she believed the defendant had been unfaithful to her. RP 57-58, 98. Upon leaving the bedroom she discovered that he was in the bathroom and so she started yelling at him through the closed bathroom door. RP 61. Once he came out of the bathroom she began grabbing items off tables and off walls and smashing them against the wall or the floor. RP 61-62. During this tirade she threw something at the light fixture in the hall and shattered it, sending broken glass over the floor. RP 63-64. In her rage she tried to walk over the broken glass in her bare feet and the defendant stopped her by standing between her and the glass, essentially pushing against her body with his chest and guiding her into the living room. *Id.*

Once in the living room she grabbed the defendant and pulled him onto a couch and then onto the floor with him on top. RP 66. He then grabbed her wrists and prevented her from damaging more property in the trailer. RP 67. Eventually he let her up and then walked out of the trailer into the woods wearing only his pajama bottoms. RP 71. She then found one of his old cell phones and called 911, falsely reporting that he had slapped and strangled her. RP 74, 94-96, 102-105. According to Ms Cypher's testimony before the jury, she had to use his old cell phone to call because the defendant had broken her cell phone when she tried to call her mother. RP 70-71.

During Ms Cypher's testimony the court allowed the state over

defense objection to play a redacted version of the 911 call to the jury. RP 24-25. The court also allowed the state to distribute copies of the transcription of that redacted 911 call to the jury so they could follow along when the audio recording was played. RP 43-54. The court had admitted these copies of the transcripts into evidence for illustrative purposes only. *Id.* After the prosecutor played the audio tape to the jury the defense discovered two things. RP 78-89. The first was that while the state had correctly redacted the audio version of the recording, the state had failed to correctly redact the copies of the transcript the court had allowed the jury to read during the playing of the recording. *Id.* The following gives lines 15 thru 20 from the redacted transcript with the erroneously unredacted line shown in bold and italics.

Dispatcher: He just wants to what?

A. Be mean. He just w-, he just (unintelligible) that's his excuse for why he's mean is 'cause he's mentally ill,' but I don't really think that.

*Dispatcher: Yeah well he doesn't get to use that as an excuse necessarily.*

Exhibit 10, page 10, lines 15-20.

During argument on this error the defense further discovered that when the bailiff had collected the redacted transcripts and set them down in the courtroom. RP 78. The prosecutor then looked at them and saw that a

jury had written a number of notes on the transcript marked for identification at 10A. RP 78. Although the facts surrounding how the prosecutor saw these notes is somewhat unclear from the record, apparently the scenario played out as follows. RP 78-89. Once the prosecutor played the 911 tape to the jury, the defense first noticed the error in the transcripts. *Id.* The jury was then excused after the bailiff gathered up each of the 13 sets of transcripts (marked for identification as 10A through 10M). *Id.* There were 13 copies marked for identification because the court had also seated an alternate. *Id.*

After gathering up the transcripts the bailiff set them somewhere near the prosecutor. RP 78-89. When the defense began its objection to the error in the transcript, the court indicated that it did not have a copy. *Id.* Apparently at this point the prosecutor picked up No. 10A from the list the bailiff had collected in order to give it to the judge. *Id.* However, the prosecutor first leafed through it and noted that the juror who used it had written notes on the pages. *See* Identification 10A. In fact, there are no handwritten notes on the first page of this document. *Id.* Rather, the handwritten notes appear on pages 5, 6, 7, 9 and 10. *Id.* They consist of underlinings, circlings and the placement of question marks. *Id.*

Upon learning that the prosecutor had seen one juror's notes written on the transcripts the defense moved for a mistrial arguing that (1) the failure to accurately redact the transcripts had prejudiced the defendant's ability to

get a fair trial, and (2) the prosecutor's review of the juror's notes constituted a prohibited communication with a juror and gave the state an unfair advantage during the remainder of the trial. RP 78-89. The prosecutor responded that while she had seen that a juror had marked pages of the transcript she did not look long enough to determine what those marks were and where they were made. *Id.* Following further argument the court denied the defendant's two motions. RP 87-89.

At the very end of direct examination of Deputy Shannon, the state elicited the following evidence concerning the defendant's admission that he had restrained Ms Cypher:

A. The gentleman came forward. He was identified as -- identified himself as Adam. He came over peaceably, came to the car. I detained him, which means putting the handcuffs on. There was no problem there. I read him Miranda from the card I carry in my pocket in front of Deputy Humphrey. When asked if he understood, he stated, "Yeah." And then I asked him what happened. He concurred with everything except for the choking, face slapping, or threats to kill.

Q. So basically he admitted to holding her down on her wrists, sitting on top of her?

A. Yes.

MR. BAUM: Objection. Leading.

THE COURT: I'll sustain that.

Q. Can you please clarify to what he agreed to then?

A. Mr. Adam Rambur stated that he was in a domestic dispute

with Sara Cypher, that he had put her on the ground, that he was sitting on top of her with the knees on her shoulders, and that he had grabbed her forearms and wrists and held them over her head.

Q. Did he indicate whether they had been throwing anything?

A. He said that Ms. Cypher was threatening to break items, throw items, and burn items.

Q. So she had been threatening to do that, but she hadn't quite done that yet?

A. Right. I asked him specifically, "Well, did she break anything?" And his response was, "No, she was just threatening to do so."

RP 158-159.

Apparently this was not the only thing the defendant said to Deputy Shannon concerning why he had restrained Ms Cypher. RP 160-161. Rather, as appears from the following question at the beginning of cross-examination, apparently Deputy Shannon put in her police report that the defendant had stated that he had restrained Ms Cypher because she was "acting crazy" and he was "trying to keep her from attacking him." *Id; see also* ID No.1 (LCSO Deputies Reports). However, as the following section from the beginning of cross-examination reveals, the court refused to allow the defense to elicit this fact:

Q. Deputy, in your report you indicate that Mr. Rambur stated that Ms. Cypher was acting crazy and he was just trying to keep her from attacking him?

MS. BOHM: Objection, Your Honor.

Q. Is that in your report?

MS. BOHM: Hearsay.

THE COURT: I'll sustain that.

RP 160-161.

After calling its third and final witness the state, without defense objection, introduced a number of documents into evidence showing that the court had ordered the defendant to return to court in this matter on November 6, 2014, and that he had failed to appear on that date as ordered. *See* Exhibits 3, 4, 5, 6 and 7. Following the admission of these exhibits the state rested its case, after which the defense rested without calling any witnesses. RP 175, 202. The court then instructed the jury with the defense taking exception to the court's refusal to give its proposed instructions on the lesser included offense of misdemeanor harassment. RP 185-190, 205; CP 78-80.

At this point both parties then presented closing argument. RP 222-252. As shown in the second and third paragraphs of the transcripts of rebuttal argument the prosecutor noted that (1) the defense had argued that the only evidence the state presented were the inconsistent statements of Ms Cypher, and (2) that Deputy Shannon's did not adequately describe the injuries she said she saw in Ms Cypher. RP 246. The prosecutor then told the jury that she personally believed Deputy Shannon's version of this evidence. *Id.* This exchange, along with the defendant's objection and the court's

ruling on that objection went as follows:

Counsel said, "Well, see, all you have is Sara Cypher. That's all she said." That's not all you have. You have what she said in the 911 call. You have what she told law enforcement again when they appeared, and you have the physical marks on her arms.

Now, counsel makes a big deal about, well, the deputies didn't really describe the bruising and the marks. *I leave it to you to decide whether the testimony was there, because I believe Sue Shannon, Deputy Shannon.*

MR. BAUM: Objection.

THE COURT: Sustained. Disregard that comment. Strike that from the record.

RP 246 (emphasis added).

After the state finished its rebuttal argument the defense moved for a mistrial, arguing that the court's admonition to the jury was insufficient to alleviate the prejudice that the prosecutor's improper argument had caused.

RP 255-256. The court denied the motion. RP 256-257.

Following deliberation in this case the jury returned the following verdicts: (1) guilty of fourth degree assault as a lesser offense to the original charge of second degree assault, (2) guilty of unlawful imprisonment, (3) not guilty of felony harassment, and (4) guilty of bail jumping. CP 154-162.

The court later held a sentencing hearing during which it imposed a sentence within the standard range. CP 165-175. The court also imposed the following discretionary legal financial obligations: (1) \$200.00 criminal filing

fee; (2) \$81.20 sheriff service fees; (3) \$1,800.00 court appointed attorney fees; and (4) \$1,000.00 jail reimbursement costs. CP 170. At sentencing the prosecutor stated the following concerning its claim that the defendant had the ability to pay legal financial obligations: "We're asking the Court to find that the defendant has the means to pay for the costs of his incarceration." CP 270. The state presented no evidence or other argument on this issue. RP 269-285. The court thereafter did not address the defendant's ability to pay his discretionary legal financial obligations. RP 278. Rather, as the following shows, the court merely imposed them:

Pay the fees, *et cetera*. The legal financial obligations, \$200 filing fee, \$500 crime victim, \$81.20 in service, \$1800 attorney fee recovery, hundred dollar DNA, hundred dollar DV assessment and a thousand dollar jail fee, payable at \$30 a month starting 60 days from his release from jail date.

RP 278.

Following imposition of sentence the defendant filed timely notice of appeal. CP 176.

## ARGUMENT

### **I. THE TRIAL COURT'S REFUSAL TO ALLOW THE DEFENSE TO ELICIT EVIDENCE THAT THE DEFENDANT HAD QUALIFIED HIS ADMISSION THAT HE HAD RESTRAINED HIS GIRLFRIEND DENIED THE DEFENDANT A FAIR TRIAL.**

While due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment does not guarantee every person a perfect trial, it does guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). In addition, under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, a defendant charged with a crime is guaranteed the right to cross-examine and impeach opposing witnesses with prior inconsistent or incomplete statements. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Dickenson*, 48 Wn.App. 457, 740 P.2d 312 (1987).

In the case at bar the trial court erred for two reasons when it sustained a hearsay objection and refused to allow the defense to cross-

examine Deputy Shannon's claim that the defendant admitted holding Ms Cypher down on the floor with the fact that what the defendant really stated to Deputy Shannon was that he committed this act in defense of his property. The trial court's first error was in failing to recognize that the defendant's question was not hearsay because it was proper impeachment with a prior inconsistent statement. The trial court's second error was in failing to recognize that the defendant's question, while invoking hearsay in so far as it was offered substantively, was still admissible under the completeness doctrine. The following examines both of these arguments.

***(1) The Defendant's Question on Cross-Examination Was Proper Impeachment with a Prior Inconsistent Statement.***

A defendant's right to impeach a prosecution witness with evidence of bias or a prior inconsistent statement is part and parcel of the constitutional right to confront witnesses. *Davis v. Alaska, supra; State v. Dickenson, supra*. Thus, any error in excluding evidence is presumed prejudicial and requires reversal unless the state can prove that the error was harmless beyond a reasonable doubt. *Davis*, 415 U.S. at 318; *Dickenson*, 48 Wn.App. at 470; *see also, State v. Fitzsimmons*, 93 Wn.2d 436, 610 P.2d 893 (1980). In addition, under ER 801(d)(1) a prior statement of a witness offered to impeach or to rebut a claim of fabrication is not hearsay. The reason is that such statements are not offered to prove the truth of the matter asserted

therein. *State v. Williams*, 79 Wn.App. 21, 902 P.2d 1258 (1995). Rather, they are offered to show the inconsistency between the two statements and thus cast doubt on the veracity on the statements themselves. *Id.*

In the case at bar the state called upon Deputy Shannon to testify that the defendant had, in essence, admitted committing the crime of unlawful imprisonment. This occurred at the end of the state's initial direct of the Deputy and went as follows:

A. The gentleman came forward. He was identified as --- identified himself as Adam. He came over peaceably, came to the car. I detained him, which means putting the handcuffs on. There was no problem there. I read him Miranda from the card I carry in my pocket in front of Deputy Humphrey. When asked if he understood, he stated, "Yeah. " And then I asked him what happened. He concurred with everything except for the choking, face slapping, or threats to kill .

Q. So basically he admitted to holding her down by her wrists, sitting on top of her?

A. Yes.

MR. BAUM: Objection. Leading.

THE COURT: I'll sustain that.

Q. Can you please clarify to what he agreed to then?

A. Mr. Adam Rambur stated that he was in a domestic dispute with Sara Cypher, that he had put her on the ground, that he was sitting on top of her with the knees on her shoulders, and that he had grabbed her forearms and wrists and held them over her head.

Q. Did he indicate whether they had been throwing anything?

A. He said that Ms. Cypher was threatening to break items, throw items, and burn items.

Q. So she had been threatening to do that, but she hadn't quite done that yet?

A. Right. I asked him specifically, "Well, did she break anything?" And his response was, "No, she was just threatening to do so."

RP 158-159.

The implication from this exchange is that Deputy Shannon was claiming that the defendant had admitted to committing the crime of unlawful imprisonment and did not claim any justification for his actions. The fact of the matter is that in her own report the Deputy made no such black and white claim. Rather, as is clear from her report of the matter (Identification No. 1), the defendant, while admitting the act of restraining Ms Cypher, had denied that he had committed a crime. Rather, what Deputy Shannon wrote in her report was that the defendant claimed that he took these actions because Ms Cypher "was just acting 'crazy' and he was trying to make sure she didn't attack him." *See* Identification No. 1, page 2, last paragraph. This written statement was at odds with Deputy Shannon's testimony during trial and the subject of proper impeachment. Thus, the trial court erred when it sustained the state's hearsay exception.

***(2) The Answer to the Defendant's Question on Cross-examination, While Hearsay in So Much as it Was Offered Substantively, Was Admissible under ER 106 and the Completeness Doctrine.***

Even had the trial court correctly identified Deputy Shannon's prior written statement concerning the defendant's admissions as hearsay, the trial court's decision to sustain the state's objection was still error because the defendant's statements to Deputy Shannon were admissible under the completeness doctrine recognized in ER 106. This rule states:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

ER 106.

The central intent of the rule is to create a "completeness doctrine" with the purpose to protect against creating a "misleading impression." 5 Karl B. Tegland, *Washington Practice: Evidence*, Section 106.1 at 115 (4th ed.1999). Thus, courts should allow testimony under the rule of completeness when it would provide context to the admitted evidence and avoid misleading the jury. *State v. Larry*, 108 Wn.App. 894, 910, 34 P.3d 241 (2001); *See also, United States v. Velasco*, 953 F.2d 1467, 1475 (7th Cir., 1992) (Evidence is admissible under the completeness doctrine if it is necessary to (1) explain the admitted evidence, (2) place the admitted

portions in context, (3) avoid misleading the trier of fact, and (4) insure fair and impartial understanding of the evidence).

In the case at bar the state offered the defendant's statements into evidence through the testimony of Deputy Shannon. However, as was mentioned in the previous section, the state's method of introducing this evidence left the jury with the false impression that the defendant had offered no justification for his actions. Rather, Deputy Shannon's testimony makes it appear as if the defendant had admitted to committing the crime of unlawful imprisonment. Thus, the testimony the defense attempted to elicit would have explained the admitted evidence, it would have placed that admitted evidence in context, it would have prevented misleading the jury, and it would have aided a fair and impartial review of the defendant's statements as the state elicited them. Consequently, under ER 106 and the attendant completeness rule, the evidence the defense attempted to elicit was substantively admissible and the trial court erred when it sustained the state's objection to it.

In this case the evidence presented was equivocal at best on all of the charges except the bail jump. First, Ms Cypher, who was the only person present during the events other than the defendant and she unequivocally repudiated the statements she made on the 911 tape as well as the statements the police claimed she made to them. Second, and perhaps more convincing,

was the fact that at the scene the police did not see any physical evidence to support Ms Cypher's claims that the defendant had slapped her in the face or strangled her. The jury's refusal to convict on the second degree assault charge and the jury's decision to acquit on the felony harassment charge illustrates the weakness in the state's case. Given the equivocal nature of this evidence, the state cannot meet its burden of proving that the trial court's error was harmless beyond a reasonable doubt. As a result, this court should reverse the defendant's conviction for unlawful imprisonment and remand for a new trial.

**II. TRIAL COUNSEL'S FAILURE TO ENDORSE A CLAIM OF SELF DEFENSE ON THE CHARGE OF UNLAWFUL IMPRISONMENT DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL.**

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to endorse self-defense on the charge of unlawful imprisonment under RCW 9A.40.040. This statute provides: "A person is guilty of unlawful imprisonment if he or she knowingly restrains another person." The legislature has defined the word "restrain" as used in this statute as follows:

(6) "Restrain" means to restrict a person's movements without

consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is “without consent” if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he or she is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him or her has not acquiesced.

RCW 9A.40.010(6).

Thus, under these two statutes, the gravamen of the offense of unlawful imprisonment is to (1) knowingly restrict a person’s movements in a manner which interferes substantially with his or her liberty, (2) without consent, and (3) without legal authority. In the case at bar the defense did not dispute the first two elements of this offense. Indeed, overwhelming evidence supported the existence of these two elements. First, Ms Cypher made this claim in her 911 call. Second, she repeated this claim when the deputies arrived. Third, the deputies saw marks on Ms Cypher’s arms consistent with this claim. Fourth, the defendant confessed to the deputies that that he had sat on Ms Cypher and held her down by her wrists. Finally, although Ms Cypher repudiated her other claims of illegal conduct when she testified at trial, she did not repudiate her prior claims that the defendant had, without her consent, restricted her movements in a manner which substantially interfered with her liberty.

What was in dispute on this offense was whether or not the defendant had acted “without legal authority.” According to his claims to the

officers at the scene, and according to Ms Cypher's detailed testimony during trial, the defendant had acted to restrain her movement with the purpose of (1) protecting Ms Cypher from physical harm, (2) protecting himself from physical harm, and (3) protecting his property from damage. Under RCW 9A.16.010(3), this conduct, if pled and proven by the defense, was legal.

This statute states:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary;

RCW 9A.16.010(3).

By adopting this statute the legislature did not create an affirmative defense. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Rather, once any evidence exists in the record to support a claim under this statute, the state is encumbered with the burden of disproving the claim of defense of self, others or property beyond a reasonable doubt. *State v. Adams*, 31 Wn.App. 393, 641 P.2d 1207 (1982). However, there is one prerequisite. Before the jury may consider a claim under this statute, the defendant must first request that the court instruct the jury on self-defense.

As was set out previously, there was significant evidence in the record to require the court to instruct on self-defense in regards to the unlawful imprisonment charge. Even absent the defendant's claims to the deputies upon his arrest, Ms Cypher's lengthy and detailed testimony on direct and cross would have compelled the court to instruct on this, which was the only available defense to the charge of unlawful imprisonment. Under these circumstances, no reasonable defense attorney would fail to propose a jury instruction on self defense when (1) the testimony from the complaining witness strongly supported the claim, and (2) there were no other defenses to argue. As a result, trial counsel's failure to seek an instruction on self defense fell below the standard of a reasonable prudent attorney.

In addition, given Ms Cypher's lengthy testimony at trial setting out her conduct destroying property and attacking the defendant, there is a substantial likelihood the jury would have acquitted on the charge of unlawful imprisonment had the defense merely proposed the instruction. As a result, the trial attorney's failure to take this action denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

**III. THE TRIAL COURT'S REFUSAL TO GRANT A MISTRIAL AFTER THE PROSECUTOR TOLD THE JURY DURING REBUTTAL THAT SHE PERSONALLY BELIEVED THE DEPUTY'S VERSION OF EVENTS DENIED THE DEFENDANT A FAIR TRIAL.**

As was stated in the beginning of the first argument, while due process under our state and federal constitutions does not guarantee every person a perfect trial, it does guarantee all defendants a fair trial. *State v. Swenson, supra; Bruton v. United States, supra*. This due process right to a fair trial is violated when the prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice, the defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

Under both Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, it is misconduct for a prosecutor to assert his or her personal opinion as to the "credibility of a witness" or the "guilt or innocence of an accused." *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984). Any such personal expression on the credibility of a witness or of "personal belief in the defendant's guilt" is "not only unethical but extremely prejudicial." *State v. Case*, 49 Wn.2d 66, 68, 298 P.2d 500 (1956).

Thus, a prosecutor should never introduce “evidence of any matter immaterial or irrelevant to the single issue to be determined.” *State v. Devlin*, 145 Wn. 44, 49, 258 P. 826 (1927). The courts “will not allow such testimony, in the guise of argument, whether or not defense counsel objected or sought a curative instruction.” *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

In the case at bar, the prosecutor directly violated this rule and committed misconduct during rebuttal argument when she expressed her personal belief that Deputy Shannon’s version of events was correct. This exchange went as follows:

Counsel said, “Well , see, all you have is Sara Cypher. That’s all she said.” That’s not all you have. You have what she said in the 911 call . You have what she told law enforcement again when they appeared, and you have the physical marks on her arms.

Now, counsel makes a big deal about, well, the deputies didn’t really describe the bruising and the marks. *I leave it to you to decide whether the testimony was there, because I believe Sue Shannon, Deputy Shannon.*

MR. BAUM: Objection.

THE COURT: Sustained. Disregard that comment. Strike that from the record.

RP 246 (emphasis added).

The defendant anticipates that Respondent will concede that the prosecutor committed misconduct when she told that jury that she believed

Deputy Shannon's testimony that she saw bruising and marks on Ms Cypher. Rather, the defendant believes that Respondent will argue that there was insufficient prejudice to justify reversing the defendant's convictions given the fact that the court immediately sustained a timely objection and instructed the jury to disregard. The problem with any such argument is that it ignores the fact that during a jury trial there are some bells which are rung so loud that no instruction from the court can undo the harm.

That this comment is one such bell is illustrated by two points. The first is that, as was recognized in *State v. Case*, a prosecutor's claim that she personally believes a particular witness or in the guilt of a defendant is not just unethical "but extremely prejudicial." *State v. Case*, 49 Wn.2d at 68. The second point is that the evidence supporting the charge of unlawful imprisonment was equivocal at best. Ms Cypher had herself testified during trial that the defendant had only restrained her to protect himself and his property from her. She further denied that she had made a number of statements that Deputy Shannon had attributed to her. Thus, in this case, the jury was called upon to directly measure Deputy Shannon's credibility against Ms Cypher's credibility. In this context it was impossible for the court's curative instruction to ameliorate the prejudice the prosecutor's highly improper statement created. Thus, in this case, this court should reverse the defendant's conviction for unlawful imprisonment and remand for a new trial

because the prosecutor's misconduct in rebuttal argument denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution; Fourteenth Amendment

**IV. THE TRIAL COURT ERRED WHEN IT IMPOSED LEGAL FINANCIAL OBLIGATIONS UPON AN INDIGENT DEFENDANT WITHOUT ADDRESSING THE DEFENDANT'S ABILITY TO PAY.**

A trial court's authority to impose legal financial obligations as part of a judgment and sentence in the State of Washington is limited by RCW 10.01.160. Section three of this statute states as follows:

(3) The court shall not sentence 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).

Although the court need not enter written findings and conclusions in regards to a defendant's current or future ability to pay costs, the court must consider this issue and find either a current or future ability before it has authority to impose costs. *State v. Eisenman*, 62 Wn.App. 640, 810 P.2d 55, 817 P.2d 867 (1991). In addition, in order to pass constitutional muster, the imposition of legal financial obligations and any punishment for willful failure to pay must meet the following requirements:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;

3. Repayments may only be ordered if the defendant is or will be able to pay;

4. The financial resources of the defendant must be taken into account;

5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;

6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion; and

7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

*State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992).

The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon*, 417 U.S. 40, 40 L.Ed.2d 642, 94 S.Ct. 2116 (1974).

In the case at bar the trial court summarily imposed legal financial obligations without any consideration of the defendant's ability to pay those obligations. Thus, the trial court violated RCW 10.01.160(3), as well as the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. As a result,

this court should reverse the imposition of legal-financial obligations and remand for consideration of the defendant's ability to pay.

In this case the state may argue that this court should not address this issue because the defendant did not preserve the statutory error at the trial level and the argument does not constitute a manifest error of constitutional magnitude as is defined under RAP 2.5(a). However, in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court took the opportunity to review the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair penalties that indigent defendant's experience based upon this failure. The court then decided to deviate from this general rule precluding review. The court held:

At sentencing, judges ordered *Blazina* and *Paige-Colter* to pay LFOs under RCW 10.01.160(3). The records, however, do not show that the trial judges considered either defendant's ability to pay before imposing the LFOs. The defendants did not object at sentencing. Instead, they raised the issue for the first time on appeal. Although appellate courts will normally decline to hear unpreserved claims of error, we take this occasion to emphasize the trial court's obligation to consider the defendant's ability to pay.

We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay. Because the records in this case do not show that the sentencing judges made this inquiry into either defendant's ability to pay, we remand the cases to the trial courts for new sentence hearings.

*State v. Blazina*, at 11-12.

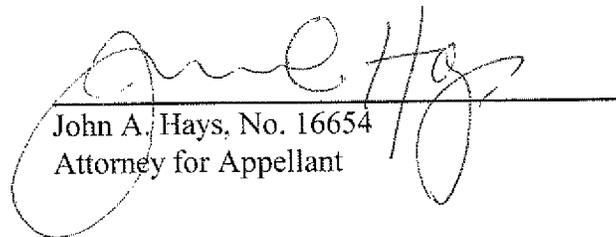
In this case the record reveals that the trial court imposed a 5 month prison sentence on a 48-year-old indigent defendant and then imposed legal financial obligations without any consideration of the defendant's ability to pay. Appellant argues that this case would also be appropriate for this court to exercise its discretion and to review the issue of legal-financial obligations.

## CONCLUSION

This court should reverse the defendant's conviction for unlawful imprisonment and remand for a new trial based upon (1) the trial court's refusal to allow the defense to present relevant and admissible exculpatory evidence on cross-examination on this charge, (2) based upon trial counsel's failure to request an instruction on self-defense which failure denied the defendant effective assistance of counsel, and (3) based upon prosecutorial misconduct. In the alternative this court should vacate the imposition of discretionary legal financial obligations based upon the trial court's failure to address the defendant's present or future ability to pay.

DATED this 5<sup>th</sup> day of August, 2015.

Respectfully submitted,

  
John A. Hays, No. 16654  
Attorney for Appellant

## **APPENDIX**

### **WASHINGTON CONSTITUTION**

#### **ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

### **WASHINGTON CONSTITUTION**

#### **ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

### **UNITED STATES CONSTITUTION, SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

**RCW 9A.40.010(6)**

The following definitions apply in this chapter:

(6) "Restrain" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he or she is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him or her has not acquiesced.

**RCW 9A.40.040**

**Unlawful Imprisonment**

(1) A person is guilty of unlawful imprisonment if he or she knowingly restrains another person.

(2) Unlawful imprisonment is a class C felony.

**COURT OF APPEALS OF WASHINGTON, DIVISION II**

**STATE OF WASHINGTON,**  
**Respondent,**

**NO. 47246-5-II**

**vs.**

**AFFIRMATION  
OF SERVICE**

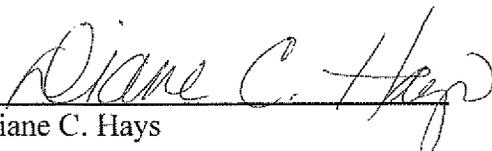
**ADAM RAMBUR,**  
**Appellant.**

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The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Jonathan Meyer  
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Dated this 5<sup>th</sup> day of August, 2015, at Longview, WA.

  
Diane C. Hays

## HAYS LAW OFFICE

**August 05, 2015 - 2:50 PM**

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Court of Appeals Case Number: 47246-5

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