

NO. 49682-8-II

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

STATE OF WASHINGTON
v.
WILLIAM JOHNSON

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

The Honorable Marilyn K. Haan, Judge

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
Issues Presented on Appeal.....	2
B. STATEMENT OF THE CASE.....	4
a. Procedural Facts.....	4
b. Trial Facts.....	5
c. Police Warrantless Intrusion into Johnson’s Home...6	
d. Jail Recordings: Defense Motions.....8	
(i) Half Time Motion.....	13
e. Off the Record Discussions.....	14
f. Prosecutorial Misconduct.....	16
g. Legal Financial Obligations.....	16
C. ARGUMENT.....	16
1. JOHNSON’S FOURTH AMENDMENT RIGHTS WERE VIOLATED BY THE WARRANTLESS IN- HOME ARREST WITHOUT ANY EXIGENT CIRCUMSTANCES.....	16
a. Domestic Violence Is Not An Exigent Circumstance.....	18
b. No Hot Pursuit.....	19
c. Not Harmless Error.....	20

TABLE OF CONTENTS

	Page
2. JOHNSON WAS DENIED DUE PROCESS WHERE THE JURY WAS PERMITTED TO CONVICT ON THE CHARGE OF OBSTRUCTING AN OFFICER BASED ON INFORMATION OBTAINED DURING AN ILLEGAL HOME ENTRY.....	21
a. Official Duties.....	21
3. JOHNSON WAS DENIED HIS RIGHT TO A PUBLIC TRIAL BY THE NINETEEN DISCUSSIONS OFF THE RECORD.....	23
4. JOHNSON WAS DENIED HIS RIGHT TO A FAIR TRIAL BY PREJUDICIAL MISCONDUCT DURING CLOSING AND REBUTTAL CLOSING.....	27
5. INEFFECTIVE ASSISTANCE OF COUNSEL DENIED JOHNSON HIS RIGHT TO A FAIR TRIAL.....	31
a. Test For Ineffective Assistance of Counsel....	31
b. Prejudicial Deficient Representation/Jail Tapes.....	32
c. Prejudicial/Deficient Performance Public Trial.....	35
6. THE TRIAL COURT ERRED BY ORDERING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS WITHOUT DETERMINING MR. JOHNSON'S ABILITY TO PAY.....	36
a. GR 34.....	38

TABLE OF CONTENTS

	Page
7. JOHNSON WAS DENIED HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE BY THE TRIAL COURT'S REFUSAL TO PROVIDE A LESSER INCLUDED INSTRUCTION ON ASSAULT IN THE FOURTH DEGREE.....	39
D. CONCLUSION.....	42

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES	
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999)	32
<i>State v. Balderas-Ramos</i> , 133 Wn. App. 1030 (2006), <i>review denied</i> 159 Wn.2d 1022, 157 P.3d 404 (2006)	41
<i>State v. Barnes</i> , 99 Wn. App. 217, 798 P.2d 1131 (1999)	22
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015)	37, 38, 39
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995)	24, 26, 36
<i>State v. Browning</i> , 67 Wn. App. 93, 834 P.2d 84 (1992).....	20
<i>State v. Case</i> , 49 Wn.2d 66, 298 P.2d 500 (1956)	27, 29
<i>State v. Chambers</i> , 197 Wn. App. 96, 387 P.3d 1108 (2016)	39
<i>State v. Counts</i> , 99 Wn.2d 54, 659 P.2d 1087 (1983)	17, 19, 20
<i>State v. Cross</i> , 156 Wn.2d 580, 132 P.3d 80, <i>cert. denied</i> , 549 U.S. 1022 (2006)	31
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992)	37
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000)	40
<i>State v. Foster</i> , 140 Wn. App. 266, 166 P.3d 726, <i>review denied</i> , 162 Wn.2d 1007 (2007) (Foster I).....	32
<i>State v. Foster</i> , 91 Wn.2d 466, 589 P.2d 789 (1979) (Foster II) ..	41, 42
<i>State v. Frawley</i> , 181 Wn.2d 452, 334 P.3d 1022 (2014)	24
<i>State v. Glasmann</i> , 175 Wn.2d 696, 286 P.3d 763 (2012)	28, 29, 30
<i>State v. Gocken</i> , 71 Wn. App. 267, 857 P.2d 1074 (1993), <i>review denied</i> , 123 Wn.2d 1024 (1994).....	19
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	31
<i>State v. Hahn</i> , 174 Wn.2d 126, 271 P.3d 892 (2012)	41, 42
<i>State v. Hamilton</i> , 179 Wn. App. 870, 320 P.3d 142 (2014) ..	17, 32, 33, 34, 35
<i>State v. Hawkins</i> , 157 Wn. App. 739, 238 P.3d 1226 (2010), <i>review denied</i> , 171 Wn.2d 1013 (2011)	31
<i>State v. Holeman</i> , 103 Wn.2d 426, 693 P.2d 426 (1985).....	17
<i>State v. Leach</i> , 113 Wn.2d 735, 782 P.2d 1035 (1989)	20
<i>State v. Marks</i> , 185 Wn.2d 143, 368 P.3d 485 (2016)	37
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	31
<i>State v. McKenzie</i> , 157 Wn.2d 44, 134 P.3d 221 (2006)	27, 28

TABLE OF AUTHORITIES

Page

WASHINGTON CASES, continued

<i>State v. Mierz</i> , 72 Wn. App. 783, 792, 875 P.2d 1228 (1994), <i>affirmed on other grounds</i> , 127 Wn.2d 460 (1995)	18
<i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011)	28, 30
<i>State v. Nichols</i> , 161 Wn.2d 1, 162 P.3d 1122 (2007)	32
<i>State v. Ortega</i> , 177 Wn.2d 116, 297 P.3d 57 (2013)	17, 36
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	32
<i>State v. Shearer</i> , 181 Wn.2d 564, 334 P.3d 1078 (2014) .	23, 26, 36
<i>State v. Smith</i> , 181 Wn.2d 508, 334 P.3d 1049 (2013)	23, 24, 25, 36
<i>State v. Sublett</i> , 176 Wn.2d 58, 292 P.3d 715 (2012)	23
<i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009)	31
<i>State v. Walker</i> , 182 Wn.2d 463, 341 P.3d 976 (2015)	27, 28, 29, 30
<i>State v. Ward</i> , 148 Wn.2d 803, 64 P.3d 640 (2003)	40
<i>State v. Whitlock</i> , 195 Wn. App. 745, 381 P.3d 1250 (2016) <i>review granted</i> , 187 Wn.2d 1002 (2017)	23, 24, 25, 26, 36
<i>State v. Wise</i> , 176 Wn.2d 1, 288 P.3d 1113 (2012)	23, 26
<i>State v. Workman</i> , 90 Wn.2d 443, 584 P.2d 382 (1978) ...	39, 40, 41

FEDERAL CASES

<i>Payton v. New York</i> , 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)	17, 18, 21, 22
<i>Press-Enter. Co. v. Superior Court</i> , 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)	24
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)	32
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	31, 32
<i>United States v. Santana</i> , 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976)	19

RULES, STATUTES, AND OTHERS

ER 401	34
ER 402	8, 9, 34
ER 403	8, 9, 34

TABLE OF AUTHORITIES

	Page
RULES, STATUTES, AND OTHERS, continued	
ER 404	34
ER 410	34
GR 14.1	41
GR 34	38
<i>People v. Fielding</i> , 158 N.Y. 542, 53 N.E. 497 (1899)	27
RCW 10.01.160	37, 39
RCW 10.31.100	18
RCW 10.99	18
RCW 10.99.010	4
RCW 10.99.020	4
RCW 10.99.030	18
RCW 10.99.040	4
RCW 10.99.050	4
RCW 26.50.010	4
RCW 26.50.110	4, 40
RCW 9.94A.753	39
RCW 9A.36.041	40
RCW 9A.76.020	4, 21
Tegland, 5A Washington Prac., Evidence Law and Practice sec. 410.1 (6 th ed.)	34
U.S. Const. Amend. IV	8, 16, 17, 18
U.S. Const. Amend. VI	23, 31
Wash. Const. art. I, § 22	23, 28
Wash. Const. art. I, § 7	17, 31

A. ASSIGNMENT OF ERROR

1. The police executed an illegal warrantless arrest inside Mr. Johnson's home without any exigent circumstances.

2. Mr. Johnson was denied his due process right to effective assistance of counsel by counsel's failure to challenge the warrantless in-home arrest during the pre-trial motions.

3. Mr. Johnson was denied his due process right to effective assistance of counsel by counsel's failure to move to suppress prejudicial irrelevant portions of the jail calls between Mr. Johnson and the complainant.

4. Mr. Johnson was denied his due process right to effective assistance of counsel by counsel's failure to move for a mistrial after defense counsel objected to the jury hearing irrelevant and prejudicial evidence played during a series of jail calls from Mr. Johnson to the complaining witness.

5. Mr. Johnson was denied his right to a public trial by nineteen off the record discussions.

6. Mr. Johnson was denied his right to a fair trial by prosecutorial misconduct during closing and rebuttal arguments where the prosecutor expressed his personal belief in Johnson's guilt by calling Mr.

Johnson a “true abuser” and by referring to his relationship with the complainant as “a rat’s nest, penitentiary-type relationship”.

7. The state failed to provide sufficient evidence to prove the elements of obstructing a police officer.

8. The trial court erred by ordering discretionary legal financial obligations without determining Mr. Johnson’s ability to pay: \$450 court costs, consisting of \$200 criminal filing fee, and \$250 jury demand fee.

9. The court erred in refusing to provide the lesser included instruction on assault in the fourth degree.

Issues Presented on Appeal

1. Where Mr. Johnson was sitting in his own home after Ms. Lingle, who was outside the home, called the police and reported a violation of a no contact order, did the police illegally enter Mr. Johnson’s home without a warrant or exigent circumstances?

2. Was Mr. Johnson denied his due process right to effective assistance of counsel by counsel’s failure to challenge the illegal, warrantless in-home arrest during the pre-trial motions?

3. Was Mr. Johnson denied his due process right to effective assistance of counsel by counsel’s failure to move to timely suppress pretrial, prejudicial, irrelevant portions of the jail calls between Mr.

Johnson and the complainant which revealed information about Mr. Johnson's plea negotiations, his bond and his status on DOC "parole"?

4. Was Mr. Johnson denied his due process right to effective assistance of counsel by counsel's failure to move for a mistrial after defense counsel objected to the jury hearing irrelevant and prejudicial information played during a series of jail calls from Mr. Johnson to the complaining witness regarding Mr. Johnson's plea negotiations, his bond and his status on "parole"?

5. Was Mr. Johnson denied his right to a public trial by the nineteen off the record discussions during critical, key witness testimony?

6. Was Mr. Johnson denied his due process right to effective assistance of counsel by counsel's failure to request that all of the off the record discussions be placed on the record?

7. Was Mr. Johnson denied his right to a fair trial by prosecutorial misconduct where the prosecutor expressed his personal belief in Johnson's guilt by referring to Mr. Johnson is a "true abuser" and in "a rat's nest, penitentiary-type relationship" with the complainant?

8. Did the state fail to provide sufficient evidence to prove the elements of obstructing a police officer where the police were not engaged in their lawful duties when they illegally entered Johnson's home without a

warrant?

9. Did the trial court err in ordering discretionary legal financial obligations without determining Mr. Johnson's ability to pay?

10. Did the court err in refusing to provide the lesser included instruction on assault in the fourth degree where the evidence supported that instruction because the complainant only suffered minor transitory injury?

B. STATEMENT OF THE CASE

a. Procedural Facts.

William Jiles Johnson was charged by fourth amended information and convicted of two counts of felony violation of a no contact order. CP 23-26. The first charge alleged assault in count I contrary to RCW 10.99.050, 26.50.110, 10.99.010(1) and 10.99.040. The second count was charged by having contact with a prohibited family member contrary to 26.50.110(1), 10.99.020 and 26.50.010(1). CP 23-26.

Johnson was also charged and convicted of obstructing a law enforcement officer contrary to RCW 9A.76.020(1). CP 23-26; 149-162. Johnson was charged by fourth amended information and acquitted of two counts of witness tampering. CP 23-26. This timely appeal follows. CP 163-177.

b. Trial Facts.

Angela Lingle called the police from outside of Johnson's home to report that Johnson violated a no contact order that prohibited him from being in a private residence with her. RP 94, 102, 230, 232. Lingle told the police that she was locked outside of her home even though she later admitted that she was not on the lease and that she only lived with Johnson in his home at times before going to work. Lingle knew of the no contact order. RP 110, 200, 207-09, 234. The no contact order permits contact in public places and on the telephone. RP 95-96; Exhibit 5.

When the police arrived, Lingle told the police that Johnson assaulted her. RP 233. Lingle had a cut on her ear, a bruise on her arm and a mark on her neck. RP 233, 263.

Lingle alleged that she slept at Johnson's house and woke up to Johnson standing over her looking "high" and angry. RP 97. Lingle asked Johnson to leave his home because she feared a physical altercation. RP 98. Lingle went to the bathroom and closed the door, which she alleged Johnson kicked in and then grabbed Lingle causing her to fall back but not into the bathtub because Lingle caught herself on the wall. RP 98.

Lingle alleged that when she came out of the bathroom, Johnson grabbed her arm and asked to talk to her, but Lingle told Johnson he was

too high and called him ugly names. RP 99-101. Lingle told Johnson she was calling the police and left the house. As Lingle was leaving, Johnson grabbed her and hit her on the back of the head near her ear. RP 102.

During the 911 call, the jury heard Lingle tell 911 that Johnson was “technically homeless” and on “parole”. RP 108-09. Johnson alone was on the lease to his home. RP 110, 200, 206, 208-09, 312-13. Lingle also knew that she was not allowed to stay at Johnson’s home for more than 15 days. RP 208-09. During the defense case, Johnson admitted to being in violation of the no contact order after Lingle came to his home, but he explained that Lingle did not live in his home, but she came over to see him the day before the incident. RP 308-09, 319-20, 328.

Johnson explained that he and Lingle argued the night before the incident and that he went out and got high, and later returned home alone to an empty house. RP 321-324. In the morning Lingle returned in her pajamas to curse at Johnson. RP 325. Johnson did not know if Lingle was hurt when she arrived at his home that morning. RP 324-25. Johnson denied assaulting Lingle. RP 325-26.

c. Police Warrantless Intrusion into Johnson’s Home.

Longview police officer Kevin Sawyer and Officer John Reeves testified before the jury that the police are required to make an arrest of

the first aggressor when they receive a 911 call for a domestic violence assault. RP 223-29, 243, 245, 253. Over defense objection, these police witnesses also testified that they were legally authorized to arrest Johnson in his home because they had probable cause to believe that an assault had occurred. RP 224-227, 234, 253, 255-56, 292, 298, 310-11.

The officers testified that they repeatedly knocked on Johnson's door and told him to come out because he was under arrest. RP 234-39, 245, 256, 310-12, 331. The police saw Johnson through a window sitting on his couch, getting up and sitting down while the police engaged him in conversation. RP 236-37, 255. Without permission, the police breached the house using a ram to break down the door. RP 260, 266-67.

Johnson did not cooperate with the arrest, insisting that the police get a warrant, and also insisting that he did nothing wrong. RP 310-14. Reeves testified that he struggled with Johnson for less than one minute inside the house and that it took an additional 30 seconds to one minute to walk Johnson to the patrol car and another 15-30 seconds to get Johnson into the patrol car. RP 256-68. No one was hurt during this interaction. RP 268.

During cross examination of Reese, the state objected to defense asking the officer if he had a warrant to enter Johnson's home. RP 75. The

defense argued that they had a right to challenge the state's assertion that they had probable cause to enter Johnson's home. RP 75-78. The court admonished the defense that counsel could not raise the issue of a warrant during trial but should have done so during motions in limine. RP 78.

Later in the trial, during the testimony of Sawyer, Johnson made a motion to suppress Sawyer's discussion of probable cause to arrest for domestic violence. RP 223. The defense unsuccessfully argued to the court that its ruling not permitting discussion of the warrantless arrest prohibited the defense from raising Fourth Amendment legal objections to the warrantless home entry. RP 224-227.

d. Jail Recordings: Defense Motions.

After the state played jail recordings of Johnson and Lingle, defense counsel argued to the court that the information was irrelevant and overly prejudicial under ER 402 and 403. RP 141-42. Specifically, the defense complained that the conversations discussed irrelevant and prejudicial information regarding bail, DOC parole, and plea negotiations. RP 114-15, 145-46.

The court overruled all of the defense objections as untimely but had concerns regarding the relevance of the DOC status and the

conversation about Johnson having been in prison. RP 150-51.

My -- the -- the two comments that I will say are a concern has to do with the DOC and having done the state time, because I'm not familiar with what the -- what statements -- or the sentences that you're talking about -- the documents, I don't know if they're connected or not.

RP 152.

The state asked defense counsel if he was making a motion for a mistrial. RP 146. Defense counsel did not respond or make a motion for a mistrial.

Later in the proceedings, during direct examination of Lingle about the jail calls, the defense objected and moved for a mistrial under ER 402 and ER 403 regarding Johnson's status on "parole". RP 217-18. The court overruled the defense stating that the information was relevant, already admitted, raised by the defense and not prejudicial. RP 218. The court denied the motion for a mistrial stating that the defense raised the issue of parole on cross examination. RP 218-19. The defense argued that the state raised the issue and the defense was trying to clarify the record. RP 218-19.

Johnson's DOC status was brought out by the state during direct examination of Lingle, who testified on direct that Johnson was on parole.

RP 108-09, 121, 125. During cross examination Lingle also explained she was not on the lease because of the no contact order and Johnson was on parole. RP 205, 220.

The state also inadvertently played an irrelevant and inadmissible jail tape to the jury which it realized. RP 167-68. The tape described Johnson being hungry, upset and without funds to purchase food in jail, and also Lingle's struggles with housing, money, and babysitting for their daughter and the dogs. RP 164-168.

The state asked the court to admonish the jury not to consider anything revealed during this tape. RP 169. After the court provided a curative instruction to disregard the tape, the defense moved for a mistrial on grounds that the tape was overly prejudicial. RP 169-70. The inadmissible tape provided:

Do you recognize those people?

A. Yes.

Q. Who are they?

A. William and I.

MS. LINGLE: (INAUDIBLE) I'm still sitting at work because I'm -- I'm staying at Arlene's house this weekend so I can fucking work. And she doesn't get off till eight. And I've been off since five.

MR. JOHNSON: What time did you have to work?

MS. LINGLE: I worked to five today. Arlene picked me up, and we dropped Amiya off at my mom's. And then we drove out here. We got out here just in time for her to drop me off at work. And now I'm just sitting here waiting for her to get

off. I was waiting for you to call. That's how bored I was. I was sitting there, like, okay, eight o'clock; he hasn't called yet. Okay, it's 8:10; he still hasn't called yet.

MR. JOHNSON: Well, you got to imagine that I'm -- I -- they let us out one (INAUDIBLE) at a time. Other people get to the phone before me. There's only two phones that work in here.

MS. LINGLE: Well, I thought maybe you --

MR. JOHNSON: (INAUDIBLE).

MS. LINGLE: -- showered or something.

MR. JOHNSON: I did do all that while the phone was going on. (INAUDIBLE), you see what I'm saying? I got -- I only get three hours out in the day. Plus, I'm hungry as fuck by the end of the day. You don't get another meal until seven in the morning.

MS. LINGLE: Yeah, I'm hungry as fuck too. My stomach's being weird, so I haven't really eaten nothing today.

MR. JOHNSON: Well -- but -- but, you -- at least you got something you can eat. I don't have nothing I can eat, Babe. I don't have no money, no store, none of that (INAUDIBLE). You're sitting at a sub shop. I'm sitting here waiting for them --

MS. LINGLE: Yeah.

MR. JOHNSON: -- to bring me bread and meat in the morning.

MS. LINGLE: Uh-uh.

MR. JOHNSON: What do you mean, "uh-uh"? That's what I'm talking about. That's what I got to live with. You know what I'm saying? I'll eat again in 11 hours. And I'm hungry now. We just ate two hours ago.

MS. LINGLE: Anybody got nothing you can buy from them?

MR. JOHNSON: With what money?

MS. LINGLE: I mean, I can come down there and put money on there.

MR. JOHNSON: Well, I don't understand why you didn't then.

MS. LINGLE: Uh, I had to work. Did you even hear what I just said, Babe?

MR. JOHNSON: I completely understand what you said. But, like, right --

MS. LINGLE: I came straight from my aunt's house --

MR. JOHNSON: I heard everything --

MS. LINGLE: -- to work.

MR. JOHNSON: -- you just said. I -- I didn't know when you did or didn't have no money, or if you had money on the card. So, you acting like I know what's in your pocket right now. Okay.

MS. LINGLE: Well, uh, like, (INAUDIBLE) put money in my pocket.

MR. JOHNSON: I -- I --

MS. LINGLE: Secondly -- secondly, you'd say, Babe, do you have any money, like, did you get any money yet? And then I would say --

MR. JOHNSON: Actually --

MS. LINGLE: -- Babe --

MR. JOHNSON: -- no, why do I need to ask you that if you know I'm in jail where I don't get -- like, there's nothing in here. You (INAUDIBLE). What -- what -- why -- why do I got to ask you for mail and money and all that? Aren't you supposed to take care of shit? That's what I'm saying. If I'm - - you're not going to do it, I'm going to find a bitch that will. (INAUDIBLE) you talking about. I don't (INAUDIBLE) understanding? Why (INAUDIBLE) I ask for that shit? I'm in here almost two weeks now. Why am I asking for it?

MS. LINGLE: You're not really asking for it. But, I have it now --

MR. JOHNSON: (INAUDIBLE).

MS. LINGLE: -- but -- so I can give it to you.

MR. JOHNSON: So, see what I'm saying; what am I saying? So, all you got to do is let me know when you are so I can know that, if I'm good, I can either switch it over to my phone right away, and I can (INAUDIBLE) phone calls, or I can order my stuff right away (INAUDIBLE) they won't take away my money. But, if you're saying I'm good, then you should get -- put money on there. And then, when I go and check my -- my (INAUDIBLE) every day, and I see zeros, I'm figuring there ain't no money around -- going around. I'm not

-- like, I'm not figuring out why you ain't ask one of my sisters, or something, maybe if they could chip in a couple of dollars or something maybe instead of just having me out here losing weight. Shit (sic).

MS. LINGLE: Losing weight. I'm done.

MR. JOHNSON: Well, if the shit (INAUDIBLE) --

MS. LINGLE: I lost 10 pounds -- I lost 10 pounds since you've been in there.

MR. JOHNSON: Good job.

MS. LINGLE: That's how stressed out I've been.

MR. JOHNSON: I'm -- I'm not stressed out, and I'm losing it. They're not feeding me enough (INAUDIBLE). Come on.

MS. LINGLE: Uh, are --

MR. JOHNSON: Are you going to come down --

MS. LINGLE: -- you (INAUDIBLE) today?

MR. JOHNSON: -- are you going to come down tonight? Are you going to come down and do it tonight (INAUDIBLE).

MS. LINGLE: Uhm, I -- I will do it if Arlene will bring me down there tonight, yeah.

MR. JOHNSON: That would be great. I would really love that so I can order tonight before they try and take it, or something like that, and I can (INAUDIBLE) order in.

MS. LINGLE: Well, the only reason they would take it is because, uh, the State still has a \$250 -- not to me, but the --

MR. JOHNSON: No --

MS. LINGLE: -- State does. So, yeah, you have to do it right

--

RP 164-68. The court denied the motion ruling that it was not prejudicial and that the jury was advised to disregard. RP 171.

(i) Half Time Motion

The defense made a half time motion arguing the state failed to prove obstructing an officer because the police made an illegal

warrantless arrest of Johnson in his home. RP 288-292. Johnson also argued that he could not be guilty of the no contact order violations or of obstructing an officer because Lingle came to his home and Johnson did not have a duty to leave his own home. RP 288-92.

e. Off the Record Discussions

There were 19 off the record discussions. RP 33, 35, 36, 92, 148, 153 (twice), 163, 169, 305, 362 (twice), 370-71, 376-77, 379-80, 384, 385 (twice). The **first** occurred after direct examination of Officer Reeves. RP 33. The **second** occurred during direct examination of Deanna Wells, director of Cowlitz County 911 Center. RP 35-36. The **third** occurred during direct examination of Lingle, after she testified that she and Johnson had a great relationship when Johnson was not abusing methamphetamine. RP 92.

The **fourth** occurred after the defense objected to the jail calls on grounds that they contained irrelevant and prejudicial information regarding DOC. The trial court agreed there was “extra verbiage” but did not suppress because Johnson did not move to suppress before the tapes were played to the jury. RP 147-49.

The **fifth** and **sixth** occurred after the court continued to admonish counsel that he should have moved to suppress portions of the jail calls

before they were played to the jury. RP 153. The **seventh** occurred during direct examination of Lingle during the playing of one of the jail conversations between herself and Johnson. RP 163. The **eight** occurred again during direct of Lingle as a “sidebar” in the middle of playing one of the jail conversations between herself and Johnson. RP 196.

The **ninth** occurred after lengthy half time motions when the jury was present in court. RP 288-305. The **tenth** occurred after closing arguments after defense counsel put on the record that the court precluded him from discussing Johnson’s Navy career, a matter of evidence brought out in testimony. RP 361-62. The **eleventh** occurred during exception to jury instructions. RP 363.

The **twelfth** occurred at the beginning of the sentencing hearing. RP 370. The **thirteenth** occurred during sentencing after the court read a letter from Lingle but did not read it into the record. RP 377. The **fourteenth** occurred during sentencing when the court read an allocution letter from Johnson but did not read that into the record. RP 380.

The **fifteenth** occurred after the court’s pronouncement of the judgment and sentence. RP 384. The **sixteenth, seventeenth** and **eighteenth** occurred after the judge delivered the judgment and sentence and discussed the right to appeal. RP 384. The **nineteenth** occurred after

the court imposed domestic violence treatment as a condition of sentence.
RP 385.

f. Prosecutorial Misconduct.

During closing argument the prosecutor described Johnson's behavior as that of a "true abuser". RP 350. During rebuttal argument, the prosecutor argued that Lingle was "trying to do what she knows best to hold together a rat's nest, penitentiary-type relationship." RP 358. The defense did not object to these arguments.

g. Legal Financial Obligations.

Without considering Johnson's ability to pay, the court imposed discretionary legal financial obligations in the amount of \$450 dollars in court costs consisting of \$200 criminal filing fee, and \$250 jury demand fee. CP 149-162.

C. ARGUMENT

1. JOHNSON'S FOURTH AMENDMENT RIGHTS
WERE VIOLATED BY THE WARRANTLESS
IN-HOME ARREST WITHOUT ANY EXIGENT
CIRCUMSTANCES.

Johnson's arrest was unlawful because it was made without a warrant and without exigent circumstances. The Fourth Amendment draws a firm line prohibiting police entrance into the threshold of a house to

effectuate a felony arrest without a warrant or exigent circumstances. *State v. Holeman*, 103 Wn.2d 426, 429, 693 P.2d 426 (1985) (citing *Payton v. New York*, 445 U.S. 573, 576, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980)). “Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” *Holeman*, 103 Wn.2d at 429.

Our State Constitution also prohibits warrantless in-home arrests and provides greater protection than the Fourth Amendment. *State v. Ortega*, 177 Wn.2d 116, 122, 297 P.3d 57 (2013); *State v. Hamilton*, 179 Wn. App. 870, 882, 883 n. 3, 320 P.3d 142 (2014). Wash. Const. art. I, § 7 guarantees:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Art 1, § 7.

Here the police did not have a warrant, exigent circumstances or the proper authority of law to enter Johnson’s home. Probable cause to arrest does not vitiate the need for a warrant to effectuate an in-home warrantless arrest without exigent circumstances. *Payton*, 445 U.S. at 573, 576; *State v. Counts*, 99 Wn.2d 54, 61, 659 P.2d 1087 (1983).

a. Domestic Violence Is Not An Exigent Circumstance.

Probable cause under the Domestic Violence Act is not an exigent circumstance that permits a warrantless in-home arrest, even though the officers believed they were required to make an arrest. Both the trial court and the officers were mistaken in believing that the Domestic Violence Protection Act, amending RCW 10.99, authorized the police to make a warrantless entry to effect Johnson's arrest. Rather, RCW 10.99.030(6) provides that the officer shall make an arrest in domestic violence situations "with reference to the criteria in RCW 10.31.100."

RCW 10.31.100(2)(b) states that the officer shall arrest the "primary aggressor" in a domestic violence situation. This statutory authorization under RCW 10.31.100 applies only when the arrest occurs in a public place. See *Payton*, 445 U.S. at 574, 576, 602 (state statutes which authorized warrantless arrests inside the home absent exigent circumstances violate the Fourth Amendment); see also *State v. Mierz*, 72 Wn. App. 783, 792, 875 P.2d 1228 (1994) (RCW 10.31.100 applies only to arrests in public places), *affirmed on other grounds*, 127 Wn.2d 460 (1995).

In short, officers may not make a warrantless entry to effect an arrest in domestic violence situations unless the officers are presented with exigent circumstances or an emergency. See also *State v. Gocken*, 71 Wn. App. 267, 275, 857 P.2d 1074 (1993) (warrantless entry based on emergency exception must not be motivated by officer's intent to make an arrest), *review denied*,

123 Wn.2d 1024 (1994).

b. No Hot Pursuit.

The state may also argue that the police were in “hot pursuit”, an exigent circumstance, but this would be incorrect under *Counts*, 99 Wn.2d at 60. The Court in *Counts*, quoted, *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed.2d 300 (1976), for the proposition that “hot pursuit” requires “*some sort of chase*”. *Counts*, 99 Wn.2d at 60 (italics in original).

In *Counts*, the police had a tracking dog that led them to Counts inside his home and mistakenly believed they did not need a warrant to forcibly enter Counts home. *Id.* The defendant conceded that the police had probable cause to arrest. *Counts*, 99 Wn.2d at 61.

The Court held that “hot pursuit” does not include the situation where the police believe they have probable cause and argue with a suspect for an hour while he sits inside his home. *Counts*, 99 Wn.2d at 60; *Santana*, 427 U.S. at 43. “The police easily could have maintained surveillance while waiting for a warrant.” *Counts*, 99 Wn.2d at 60.

The Supreme Court held that the warrantless forcible home entry required a remand for a new trial with jury instructions that Counts was permitted to defend against the unlawful police entry that led to the assault charge. *Counts*, 99 Wn.2d at 59-61.

Counts is on point regarding the lack of a hot pursuit because here as in *Counts*, there was no chase; and both defendants were sitting in their homes while the police argued with them. *Counts*, 99 Wn.2d at 60. As in *Counts*, the police here were required to obtain a warrant before entering Johnson's home. *Counts*, 99 Wn.2d at 60.

d. Not Harmless Error

Where the homeowner does not consent to the warrantless police intrusion, all evidence obtained from that intrusion must be suppressed. *State v. Browning*, 67 Wn. App. 93, 98-99, 834 P.2d 84 (1992). (Browning did not consent to entry; thus, all evidence obtained as a result of the entry must be suppressed).

Where, "the police had ample opportunity to obtain a warrant", the Supreme Court does "not look kindly on their failure to do so." *State v. Leach*, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989). Here, the police had ample opportunity obtain a warrant but chose not to do so. Because the home entry was illegal, Johnson seeks suppression of all of the evidence surrounding the police efforts to enter the home, the home entry, the struggle with Johnson and any exchanges made after the police breached the home.

2. JOHNSON WAS DENIED DUE PROCESS WHERE THE JURY WAS PERMITTED TO CONVICT ON THE CHARGE OF OBSTRUCTING AN OFFICER BASED ON INFORMATION OBTAINED DURING AN ILLEGAL HOME ENTRY.

The trial court erred by denying counsel's half time motion to dismiss the obstructing charge arising from an illegal warrantless arrest of Johnson in his home because the state failed to prove the essential elements: (1) obstructing; and (2) a police officer executing his lawful duties, where the arrest was unlawful under *Payton*, 455 U.S. 573, and the officer testified that the arrest took an additional 1-2 minutes because Johnson dragged his feet. RP 288-292.

In relevant part, the elements of Obstructing an Officer are:

(1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

RCW 9A.76.020.

a. Official Duties.

In the context of obstructing a police officer, "an unlawful detention is by definition not part of lawful police duties". *State v. Barnes*, 99 Wn.

App. 217, 220, 798 P.2d 1131 (1999).

In *Barnes*, the police unlawfully seized Barnes without a warrant. *Barnes*, 99 Wn. App. at 223. Barnes “physically resisted an officer who told Barnes he was going to search for weapons. Barnes who was carrying crack cocaine and a crack pipe jammed his hands in his pockets and struggled.” *Barnes*, 99 Wn. App. at 217, 220.

Barnes was arrested for obstructing a law enforcement officer but never charged with that crime. The Court distinguished an arrest for assaulting a police officer from obstructing on the basis that obstructing goes to whether the arrest was lawful whereas assault does not. *Barnes*, 96 Wn. App. at 224.

Here, as in *Barnes*, the state could not establish the essential element of lawful police duties because the police action in executing an arrest inside Johnson’s home without a warrant was unlawful, under *Payton*, 455 U.S. 573; *Barnes*, 99 Wn. App. at 217, 220. Accordingly, Johnson cannot be guilty of obstructing an officer who was not carrying out his lawful duties. *Barnes*, 96 Wn. App. at 220. This Court must remand for dismissal with prejudice on the charge of obstructing an officer.

3. JOHNSON WAS DENIED HIS RIGHT TO A PUBLIC TRIAL BY THE NINETEEN DISCUSSIONS OFF THE RECORD.

Defendants have a constitutional right to a public trial. U.S. Const. Amend. VI; Wash. Const. art. I, § 22. A violation of the public trial right can be raised for the first time on appeal. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012); *State v. Whitlock*, 195 Wn. App. 745, 750, 381 P.3d 1250 (2016). Failure to object at trial does not constitute a waiver of a defendant's public trial right. *State v. Shearer*, 181 Wn.2d 564, 569, 334 P.3d 1078 (2014). The right to a public trial is not absolute. *Shearer*, 181 Wn.2d at 569. Competing rights and interests often require trial courts to limit public access to a trial. *Id.*

Alleged violations of the right to a public trial present a question of law that the Court reviews de novo. *State v. Smith*, 181 Wn.2d 508, 513, 334 P.3d 1049 (2013).

The first step in analyzing whether a defendant's right to a public trial has been violated is to inquire whether the court proceeding implicated the right. *Smith*, 181 Wn.2d at 513. If the public trial right is implicated, the second step inquires whether there was a closure, and the third step inquires whether the closure was justified. *Id.* (*quoting State v. Sublett*, 176 Wn.2d 58, 92, 292 P.3d 715 (2012). (Madsen, C.J., concurring)).

The Court uses the “experience and logic” test to determine whether the proceeding at issue implicates the public trial right. *Smith*, 181 Wn.2d at 514.

“The first part of the test, the experience prong, asks ‘whether the place and process have historically been open to the press and general public.’ The logic prong asks ‘whether public access plays a significant positive role in the functioning of the particular process in question.’”

Smith, 181 Wn.2d at 514 (quoting, *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8-10, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). *Id.*

“Evidentiary arguments and rulings have always occurred in open court, although sometimes in hushed sidebar tones. There rarely are good reasons for private evidentiary conferences, absent compelling factors that could be weighed in a *Bone-Club* analysis. Any other reason to conduct a private evidentiary conference would be based on mere convenience and, thus, would not be appropriate. *Whitlock*, 195 Wn. App. at 753 1(citing, *State v. Frawley*, 181 Wn.2d 452, 460, 334 P.3d 1022 (2014)).

The 19 sidebars were presumably evidentiary rulings that implicate public trial rights. However, sidebars on evidentiary objections during trial may not implicate the public trial right if certain precautions are made.

1 (*review granted*, 187 Wn.2d 1002 (2017)),

Smith, 181 Wn.2d at 519. “[T]o avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, must be done only to avoid disrupting the flow of trial, **and must be conducted either on the record or promptly memorialized on the record.**” *Smith*, 181 Wn.2d at 516 n.10 (emphasis added).

In *Smith*, a Cowlitz County case, the court conducted 13 sidebar conferences during trial. *Smith*, 181 Wn.2d at 511. Due to the unique design of the court room, the court held sidebars in the hall way to ensure that the jury did not hear the nature of the sidebars. *Id.* To protect the defendant’s public trial rights those hall way side bars were videotaped and recorded, “thus part of the trial record”. *Id.* The sidebars were also used “to avoid delay to avoid delay caused by sending the jury to and from the jury room.” *Smith*, 181 Wn.2d at 516 n. 10.

Here, the court did not put any of the 19 sidebars on the record and there was no video recording of these conferences. The sidebars implicated Johnson’s public trial rights and they were closures.

In *Whitlock*, a case involving a bench trial, the Court held that there was no justification for an in-chamber’s conference for expediency. *Whitlock*, 195 Wn. App. at 753. Additionally, the court did not immediately memorialize the conference but rather allowed “quite some time” to pass.

Id. The Court held that there was a closure and in the absence of a *State v. Bone-Club*, 128 Wn.2d 254, 258, 906 P.2d 325 (1995), analysis, the closure could not be justified. *Whitlock*, 195 Wn. App. at 755.

In Johnson's case the court did not conduct a *Bone –Club* analysis for any of the 19 sidebars. Accordingly, under *Whitlock*, the 19 sidebars were closures that were not justified because "evidentiary arguments and rulings have always occurred in open court". *Whitlock*, 195 Wn. App. at 753, 755.

There was no *Bone-Club* analysis and therefore no articulated justification for the closures. If the court engages in a *Bone-Club* analysis, it must take place prior to closing the courtroom. *Wise*, 176 Wn.2d at 10. Closing the courtroom without considering the *Bone-Club* factors is structural error and is presumed to be prejudicial. *Shearer*, 181 Wn.2d at 569.

Here, Johnson's public trial rights were violated as described and the error was structural due to the lack of a *Bone-Club* analysis. Accordingly, this Court must reverse for structural error and remand for a new trial. *Shearer*, 181 Wn.2d at 569; *Whitlock*, 195 Wn. App. at 755.

4. JOHNSON WAS DENIED HIS RIGHT TO A
FAIR TRIAL BY PREJUDICIAL MISCONDUCT

DURING CLOSING AND REBUTTAL
CLOSING.

Mr. Johnson was denied his right to a fair trial by prosecutorial misconduct where the prosecutor called Mr. Johnson a “true abuser” and called Mr. Johnson’s relationship with the complainant “a rat’s nest, penitentiary-type relationship”.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney’s conduct was both improper and prejudicial. *State v. Walker*, 182 Wn.2d 463, 477-78, 341 P.3d 976 (2015). In determining prejudice, the Court examines the misconduct in the full trial context, including the evidence presented. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Generally the prosecutor’s improper comments are prejudicial only where there is a substantial likelihood the misconduct affected the jury’s verdict. *Id.*

The prosecutor is a representative for the people; this includes the defendant. *State v. Case*, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956) (citations omitted). Accordingly, “the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated.” *Case*, 49 Wn.2d at 71 (quoting, *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899)).

The prosecutor violates a defendant's art. I, § 22 right to an impartial jury when the prosecutor resorts to expressing his personal opinion of the defendant's guilt and when making derogatory statements or inferences about a defendant to make a conviction. *Walker*, 182 Wn.2d at 477-78; *State v. Glasmann*, 175 Wn.2d 696, 710, 286 P.3d 763 (2012); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); *c.f. McKenzie*, 157 Wn.2d at 53 (calling defendant a "rapist" was a reasonable inference from the evidence presented at trial.)

Prosecutorial misconduct cannot survive a constitutional harmless error test "unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict." *Monday*, 171 Wn.2d at 680.

In *Monday*, the Court reversed for prejudicial misconduct where during closing argument, the prosecutor made derogatory, racist commentary by informing the jury that "black folk" do not "snitch" on each other and referred to the police as "polecce". *Monday*, 171 Wn.2d at 678-79. The defense did not object, but the Court held the misconduct to be flagrant and ill-intentioned, and incurable with an instruction. *Monday*, 171 Wn.2d at 680.

In *Walker*, the prosecutor used a PowerPoint to call the defendant derogatory names such as: 'greedy', 'callous', and to state "money is more

important than human life” *Walker*, 182 Wn.2d at 473-75. The slide show also present[ed] derogatory depictions of the defendant that expressed the prosecutor’s personal opinions on the defendant’s guilt. *Walker*, 182 Wn.2d at 478.

The Court held that the prosecutor’s misconduct was “egregious” “flagrant” and “ill-intentioned” and that while preferable to object, it was “unnecessary in cases of incurable prejudice because ‘there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.’”. *Walker*, 182 Wn.2d at 477-78 (quoting, *Case*, 49 Wn.2d at 74).

In evaluating the case in its entirety, the Court held that regardless of the strength of the state’s case, and it was strong, the “impact” of the misconduct depicting the prosecutor’s personal belief in the defendant’s guilt in a derogatory manner was “presumptively prejudicial” because the slide show was designed to “distract the jury from its proper function as a rational decision-maker. “*Walker*, 182 Wn.2d at 479 (citing, *Glasmann*, 175 Wn.2d at 710.

Similarly, in *Glasmann*, the Court reversed for misconduct where the prosecutor impermissibly used a PowerPoint that included altered exhibits that expressed the prosecutor’s derogatory opinion of the defendant’s guilt. *Glasmann*, 175 Wn.2d at 710.

Calling Johnson a “true abuser” was an expression of the prosecutor’s personal beliefs on Johnson’s guilt. Calling Johnson’s relationship with the complainant, “a rat’s nest, penitentiary-type relationship”, was also an impermissible expression of the prosecutor’s personal beliefs.

In *Monday*, the nuance was racially derogative, in *Walker*, and *Glasmann*, the slides called the defendant names. In this case as in each of these case, the prosecutor used derogatory language to express his personal beliefs on Johnson’s guilt. It is likely, these offensive remarks were intended to distract the jury from the facts as rational decision makers, to instead focus on the prosecutor’s belief that Johnson was a nasty character. Our Supreme Court has repeatedly held that this is flagrant, ill-intentioned misconduct that cannot be cured with an instruction. *Walker*, 181 Wn.2d at 479-81; *Glasmann*, 175 Wn.2d at 710-11; *Monday*, 171 Wn.2d at 678-80.

Under this precedent, this Court should remand for reversal and a new trial.

5. INEFFECTIVE ASSISTANCE OF COUNSEL
DENIED JOHNSON HIS RIGHT TO A FAIR
TRIAL.

a. Test For Ineffective Assistance of Counsel.

The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sixth Amendment to the U.S. Constitution and art. I, § 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient; falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn. App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *Grier*, 171 Wn.2d at 33

(citing, *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999)).

Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that “there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.” *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007) (Foster I).

b. Prejudicial Deficient Representation/Jail Tapes.

A defendant is prejudiced when counsel fails to make a motion to suppress prejudicial, inadmissible evidence that would have been suppressed. *Hamilton*, 179 Wn. App. at 882. In *Hamilton*, trial counsel moved to suppress evidence found in a purse that Hamilton's husband

retrieved from their joint home, based on a warrantless home entry. *Hamilton*, 179 Wn. App. at 876-77. Counsel did not move to suppress based on an unlawful warrantless search of the purse. *Id.*

The police did not have a warrant to search Hamilton's home or her purse and there were no exigent circumstances. *Hamilton*, 179 Wn. App. at 879-80. Hamilton did not consent to her husband removing the purse from the home, there was no evidence of abandonment, and Hamilton alone had the power to consent to the search, not her husband. *Id.*

The Court held that "these facts give rise to a valid argument for suppression based on an unlawful warrantless search of a purse in which Hamilton had an expectation of privacy." *Hamilton*, 179 Wn. App. at 880. In finding prejudice, the Court explained that "[m]oving to suppress the evidence would not have involved any risk to Hamilton. *Id.* If she prevailed, the charges would be dismissed. If the motion was denied, she could proceed to trial." *Id.*

The Court reversed and dismissed Hamilton's conviction because there was no tactical reason to fail to move to suppress the search of the purse, there was no risk to Hamilton and she would likely have prevailed on a motion to suppress. *Hamilton*, 179 Wn. App. at 888.

The subject of the motion to dismiss in this case is different than in *Hamilton*, but the legal analysis is on point. Here, as in *Hamilton*, there was no risk to moving to timely suppress the irrelevant, prejudicial jail tapes and there was no reason not to move for a mistrial, because both motions likely would have been granted under ER 401; 402; 403, 404; and 410. The evidence was not relevant, constituted prior bad acts and was overly prejudicial because it suggested that Johnson was a criminal type with a criminal past.

The evidence of the plea negotiations was per se inadmissible under ER 410 which provides:

Except as otherwise provided in this rule, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

ER 410.

The purpose of ER 410 is to promote early resolution of cases with assurance that the defendant's statements made during plea negotiations would not be used against him. Tegland, 5A Washington Prac., Evidence Law and Practice sec. 410.1 (6th ed.). "The exclusionary principle in Rule

410 is written in absolute terms. Only one narrow exception is made for admitting statements in a criminal proceeding for perjury or false statement.” Id.

Counsel understood that evidence of Johnson’s plea negotiations was inadmissible. The trial court did not rule that the offending evidence was relevant but rather expressed concern that the evidence was prejudicial, thus telegraphing the likelihood that the court would have suppressed had counsel made a timely motion. The court denied the motion because it was untimely. (It was made after the evidence was presented to the jury). RP 150-51.

Under *Hamilton*, Johnson was prejudiced because there was no tactical reason not to move to suppress and to move for a mistrial where the court telegraphed that it would likely have suppressed the evidence, and had the evidence been suppressed, or a mistrial granted, Johnson would have been able to obtain a fair trial based exclusively on admissible evidence rather based on irrelevant prejudicial DOC, bond, and plea evidence.

c. Prejudicial/Deficient Performance Public Trial

The evidentiary portion of the trial in this case only lasted 2 days, yet there were 19 off the record conferences. Given the relatively short

duration of the trial and the very high number of off the record conferences, it is impossible to determine that counsel was reasonable in failing to insist on making a record of these conferences. *Smith*, 181 Wn.2d at 516 n.10; *Flores–Ortega*, 528 U.S. at 481.

Closing the courtroom without considering the *Bone-Club* factors is structural error and is presumed to be prejudicial. *Shearer*, 181 Wn.2d at 569. Here counsel's failure to request a *Bone-Club* analysis contributed to the court's structural error which is per se prejudicial under *Whitlock*, 195 Wn. App. at 755.

This Court should reverse and remand for a new trial because Johnson was denied his due process right to effective assistance of counsel by counsel's failure to move to suppress highly prejudicial, irrelevant evidence, failed to move to place the sidebar conferences on the record and failed to object to prosecutorial misconduct,

6. THE TRIAL COURT ERRED BY ORDERING
DISCRETIONARY LEGAL FINANCIAL
OBLIGATIONS WITHOUT DETERMINING
MR. JOHNSON'S ABILITY TO PAY.

The trial court erred by ordering discretionary legal financial obligations without determining Mr. Johnson's ability to pay: \$450 court costs, consisting of \$200 criminal filing fee, and \$250 jury demand fee. CP

149-162.

RCW 10.01.160 allows courts to require defendants to pay costs, including fees for court appointed counsel. Use of the term “may” in RCW 10.01.160(1) means that the trial court has discretion whether to impose costs under that statute. See *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992) (holding that the imposition of costs is within the sentencing court's discretion).

Citing, *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the state Supreme Court in *State v. Marks*, 185 Wn.2d 143, 145-46, 368 P.3d 485 (2016), held that when the trial court does not make an individualized inquiry into a defendant's ability to pay, the reviewing court should exercise its discretion to consider the issue on its merits, even when trial counsel fails to object. *Marks*, 185 Wn.2d at 145-46; *Blazina*, 182 Wn.2d at 837-39.

RCW 10.01.160(3) states that the sentencing court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” In *Blazina*, 182 Wn.2d at 838, the Supreme Court held that RCW 10.01.160(3) requires the sentencing court to make an individualized inquiry into a defendant's current and future ability to pay before imposing discretionary LFOs. The court emphasized that in order to comply

with RCW 10.01.160(3), the sentencing court must do more than “sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.” *Id.*

a. GR 34.

In addition to the ability to pay inquiry, the Court in *Blazina* recommended reliance on GR 34 for guidance in determining when to waive fees. For example, if a person meets the indigency requirements under GR 34 “courts should seriously question that person's ability to pay LFOs.” *Blazina*, 182 Wn.2d at 838-39. Here, the trial court and the court of appeals determined that the defendant was indigent, but the trial court did not make any inquiry into the defendant's ability to pay LFO's. CP 178-80. The judgment and sentence contained the same boiler plate language rejected by the Court in *Blazina*.

However, here, the court did not even bother to check the box which summarily determines that defendants can pay his/her LFO's. CP 149-162.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS The court has considered the total amount owing, the defend[ant]'s past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The

court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 155; *Blazina*, 182 Wn.2d at 831-32.

This court must vacate the cost bill order because the trial court's failure to inquire into the defendant's ability to pay LFO's, violates the mandatory language in RCW 10.01.160(3) and *Blazina*.

7. JOHNSON WAS DENIED HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE BY THE TRIAL COURT'S REFUSAL TO PROVIDE A LESSER INCLUDED INSTRUCTION ON ASSAULT IN THE FOURTH DEGREE.

A party is entitled to a jury instruction on a lesser offense if (1) the elements of the lesser included offense are a necessary element of the charged offense and (2) the evidence supports an inference that the lesser offense was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *State v. Chambers*, 197 Wn. App. 96, 119-20, 387 P.3d 1108 (2016).

In other words, if it is not possible to commit the greater offense without also committing the lesser offense, the court must provide the instruction. *Workman*, 90 Wn.2d at 447-48.

Johnson was charged with felony violation of a no contact order by

assault. CP 149. Assault in the fourth degree satisfies the *Workman*, legal prong for felony violation of a no-contact order committed by assault. RCW 26.50.110(4). This statute provides that “[a]ny assault that is a violation of an order issued under this chapter ... and that does not amount to assault in the first or second degree ... is a class C felony.”. *Id.* Fourth degree is an assault that does not amount to assault in the first or second degree. *State v. Ward*, 148 Wn.2d 803, 810-12, 64 P.3d 640 (2003)² (“A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.”) RCW 9A.36.041.

Under *Workman*’s second prong (the “factual prong”), the Court views the supporting evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

The legal prong is met in this case because “[e]very degree of assault is a lesser included offense of all higher degrees of assault.” *State*

² The Court in *Ward* explained that the legislature enacted RCW 26.50.110 to punish more seriously violations of no contacts orders involving assaults, but did not need to do so for assault in the first or second degree, because those crimes are Class A and B felonies. *Ward*, 148 Wn.2d at 810-13. By contrast, assault in the third degree that’s is a Class C felony and assault in the fourth degree that is a gross misdemeanor. *Ward*, 148 Wn.2d at 810-13. Either suffices to elevate a no contact order violation to a class C felony. *Id.*

v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979) (Foster II).

Fourth degree assault is an assault with little or no bodily harm, committed without a deadly weapon—so-called simple assault. *State v. Hahn* 174 Wn.2d 126, 129, 271 P.3d 892 (2012). Here, Lingle testified that she did not notice her injuries, but later at work felt like she had been punched and her bruise “stung”. RP 101, 103, 233, 236.

In an unpublished opinion with similar facts, the victim testified that defendant grabbed her arm, leaving bruises. *State v. Balderas-Ramos*, 133 Wn. App. 1030 (2006), *review denied* 159 Wn.2d 1022, 157 P.3d 404 (2006)).

The Court held that the defendant was entitled to a lesser instruction on assault in the fourth degree for both counts of the felony violation of a court order. *Balderas-Ramos*, 133 Wn. App. 1030. This decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate according to GR 14.1.

The assault in this case involved little or no bodily harm. RP 233, 263. When viewed in the light most favorable to the state, this testimony supports an inference that Johnson committed fourth degree assault under *Workman’s* legal and factual prongs.

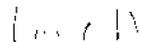
This Court should reverse and remand for a new trial because Johnson met the legal and factual prongs for an assault in the fourth degree instruction. *Hahn*, 174 Wn.2d at 129; *Foster II*, 91 Wn.2d at 472.

D. CONCLUSION

Mr. Johnson respectfully requests this Court dismiss with prejudice his conviction for obstructing a police officer based on insufficient evidence of the essential element that the police were acting lawfully. Mr. Johnson also requests this Court reverse and remand for a new trial for: ineffective assistance of counsel; violation of his public trial right; prosecutorial misconduct; denial of his request for a lesser included instruction on assault in the fourth degree. Mr. Johnson also requests this Court remand for resentencing to vacate the imposition of discretionary legal financial obligations.

DATED this 26th day of May 2017.

Respectfully submitted,



LISE ELLNER WSBA#20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Cowlitz County Prosecutor at appeals@co.cowlitz.wa.us and William Johnson, 379598, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed, on May 26, 2017. Service was made electronically to the prosecutor and via U.S. Mail to William Johnson.

Lise Ellner

Signature

LAW OFFICES OF LISE ELLNER

May 26, 2017 - 10:55 AM

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