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NO. 51229-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

ALBERT MCGREGOR,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

Grays Harbor County Cause No. 17-1-00260-0

The Honorable F. Mark McCauley, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. McGregor was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Mr. McGregor was denied his article I, section 22 right to the effective assistance of counsel.
3. Mr. McGregor's defense attorney provided ineffective assistance of counsel by failing to object to evidence that was inadmissible under ER 404(b).
4. Mr. McGregor's defense attorney provided ineffective assistance of counsel by failing to object to evidence that was inadmissible under ER 403.
5. Mr. McGregor's defense attorney provided ineffective assistance of counsel by failing to object to evidence that was inadmissible under ER 703.
6. Mr. McGregor was prejudiced by his attorney's deficient performance.

ISSUE 1: A criminal defense attorney provides ineffective assistance of counsel by failing to object to inadmissible evidence that prejudices the defense. Did Mr. McGregor's attorney provide ineffective assistance by failing to object to testimony from multiple state witnesses speculating that he had been involved in numerous other suspicious fires besides the very small one for which he was charged?

7. Direct police comment on Mr. McGregor's exercise of his right to counsel violated his Fourteenth Amendment right to due process.
8. Direct police comment on Mr. McGregor's exercise of his right to remain silent violated his Fourteenth Amendment right to due process.
9. Direct police comment on Mr. McGregor's exercise of his right to counsel violated his rights under the Sixth and Fourteenth Amendments
10. Direct police comment on Mr. McGregor's exercise of his right to remain silent violated his rights under the Fifth and Fourteenth Amendments.

ISSUE 2: Police testimony directly commenting upon an accused person's exercise of his/her *Miranda* rights violates

due process by undermining the implicit assurance that the exercise of those rights does not carry any penalty. Was Mr. McGregor's right to due process violated by police testimony explicitly informing the jury that Mr. McGregor had terminated a police interview related to the charge at issue by asking to talk to an attorney?

11. The cumulative effect of the errors at trial requires reversal of Mr. McGregor's conviction.

ISSUE 3: The cumulative effect of errors during a trial can require reversal when, taken together, they deprive the accused of a fair trial. Does the doctrine of cumulative error require reversal of Mr. McGregor's conviction for when errors by the court and his defense attorney worked together to expose the jury to a large amount of evidence encouraged the jury to convict based on factors unrelated to the evidence of the charge against him?

12. The trial court exceeded its authority by ordering Mr. McGregor to pay \$650 toward the cost of his court-appointed attorney.
13. The trial court exceeded its authority by order Mr. McGregor to pay \$650 toward the cost of the defense expert witness.
14. The trial court erred by entering finding of fact 2.5. (CP 54).
15. Mr. McGregor's defense attorney provided ineffective assistance of counsel by recommending that his indigent client be required to pay \$650 in attorney's fees.

ISSUE 4: A sentencing court may not order a person to pay the costs of his/her defense without conducting an individualized inquiry into his/her means to do so? Did the court err by ordering Mr. McGregor – who is indigent – to pay \$1300 toward the cost of his court-appointed attorney and defense expert without analyzing whether he had the ability to do so?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

William McGregor was asleep at home in the early-morning hours when two house fires occurred kitty-corner from one another in his neighborhood in Hoquiam. RP (11/7/17) 8; RP (11/8/17) 255-56. Mr. McGregor found out about the fires the next day. RP (11/8/17) 260.

The police eventually identified Mr. McGregor as a suspect related to a very small portion of one of the fires. RP (11/7/17) 29-30.

The state charged Mr. McGregor with second degree arson based on the theory that he had caused a small amount of charring on the outside of the door jamb to the garage of one of the houses. CP 1-2; RP (11/9/17) 105-27. The state did not allege that Mr. McGregor had caused the much larger kitchen fire in that house (at 459 Emerson) or that he had anything to do with the large fire in the other house (at 502 Karr). *See* CP 1-2; RP (11/9/17) 105-27.

Even so, the witnesses for the state repeatedly compared the fires at the two houses, even going so far as the speculate that they had been started by the same person. RP (11/7/17) 32, 41-43; RP (11/8/17) 204-05.

A police sergeant told the jury that there had been four to five suspicious fires over a six-month period preceding the one with which Mr.

McGregor was charged. RP (11/7/17) 32. He said that he had seen Mr. McGregor outside of one of those fires. RP (11/7/17) 32.

The sergeant said that the fires at 502 Karr and 459 Emerson were both suspicious because they both occurred in uninhabited homes. RP (11/7/17) 41. The sergeant told the jury that he suspected that the same person had started the large fires in both houses as well as the small charring with which Mr. McGregor was charged:

My theory would be somebody started 502 Karr on fire, went across the street, started the fire at 459 in the alcove, got it going a little bit, went around to the back. Somebody saw the fires, reported them, the police and fire show up, the person in the back gets spooked ... and leaves.
RP (11/7/17) 43.

The fire Captain also told the jury that all of the fires were “suspicious” because they were both in vacant houses and one of the houses had been burned before. RP (11/8/17) 204-05.

Mr. McGregor’s defense attorney did not object to any of this testimony. *See* RP (11/7/17) 32, 41-43; RP (11/8/17) 204-05. In fact, defense counsel acceded to the evidence regarding the 502 Karr fire at the beginning of trial. *See* RP (11/7/17) 10-11. This is true even though defense counsel had originally moved *in limine* to prohibit testimony regarding any of the fires other than the one for which Mr. McGregor was charged, including that at 502 Karr. CP 25.

The state's allegation at trial was that Mr. McGregor had started the small fire in the back of 459 Emerson by using a can of WD-40 as a blow torch. RP (11/8/17) 214; RP (11/9/17) 105-27. The police found a can of WD-40 with Mr. McGregor's palm print on it very near the charring. RP (11/7/17) 12; RP (11/8/17) 168. The police also found a cigarette butt in the backyard that had Mr. McGregor's DNA. RP (11/7/17) 12; RP (11/8/17) 185.

But the state did not claim that Mr. McGregor had used the cigarette to actually ignite the fire because that would have been impossible. RP (11/9/17) 32, 76-77, 105-27. Rather, the state asked the jury to infer that there had been some other ignition source, even though none was ever found. RP (11/9/17) 147.

The police sergeant who arrested Mr. McGregor told the jury that Mr. McGregor had cut off all questioning and requested an attorney once he asked him about the WD-40 can:

POLICE SERGEANT: Then I asked if he had any aerosol flammable liquid containers that might have been stolen and he said no.

PROSECUTOR. And at that point the interview is ended; is that correct?

POLICE SERGEANT. Yes. At that point he asked for an attorney.

PROSECUTOR. Okay.

RP (11/7/17) 38.

Mr. McGregor called an expert fire investigation witness in his defense. RP (11/9/17) 3-84. That witness testified to the requirements for

becoming a qualified fire investigator, none of which were met by the police or fire officials who conducted the investigation in Mr. McGregor's case. RP (11/9/17) 10-18.

The fire expert also described the proper process for investigating the source and cause of a fire, which requires eliminating all other possible causes before determining that an arson has taken place. RP (11/9/17) 22-31.

Regarding the fire for which Mr. McGregor was charged, the expert opined that the investigation team should have called an independent electrician to determine whether it could have been an electrical fire. RP (11/9/17) 49-50. He noted that some burn patterns above a porch light and on the flooring raised red flags that the fire could have been electrical in nature. RP (11/9/17) 38-40; Ex. 39. He also pointed out that some of the circuits in the breaker box had been tripped. RP (11/9/17) 40-41.

The fire Captain's report from the day of the fire said that an independent electrical assessment was "pending." RP (11/8//17) 226. But that assessment was never completed. *See RP generally.*

The jury found Mr. McGregor guilty of the arson charge. CP 35.

The trial court found Mr. McGregor indigent at both the beginning and the end of proceedings. CP 4, 68-69. Even so, the court ordered him to

pay \$650¹ in attorney's fees as well as \$650 toward the cost of his defense expert. CP 57-58. The court did not conduct any inquiry into Mr. McGregor's ability to pay legal financial obligations (LFOs) at sentencing. *See* RP (11/15/17).

This timely appeal follows. CP 70.

ARGUMENT

I. MR. MCGREGOR'S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO EXTENSIVE TESTIMONY SPECULATING THAT HE HAD BEEN INVOLVED IN OTHER SUSPICIOUS FIRES IN THE AREA.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).²

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that counsel's mistakes affected the outcome of the proceedings. *Id.*

¹ Defense counsel actually recommended the \$650 in attorney's fees in his sentencing memorandum. CP 48.

² Ineffective assistance of counsel claims are reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

A “reasonable probability” under the prejudice standard for ineffective assistance requires less than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, “it is a probability sufficient to undermine confidence in the outcome.” *Id.*; *see also Jones*, 183 Wn.2d at 339.

The presumption that a defense attorney has acted reasonably is rebutted if “no conceivable legitimate tactic explains counsel’s performance.” *State v. Fedoruk*, 184 Wn. App. 866, 880, 339 P.3d 233 (2014) (*quoting State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

Defense counsel provides ineffective assistance by waiving a valid objection without any sound strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Under ER 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b) must be read in conjunction with ER 403. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The proponent of the evidence carries the burden of establishing

that it is offered for a proper purpose. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2015).

Before admitting misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Slocum*, 183 Wn. App. at 448. The court must conduct this inquiry on the record. *McCreven*, 170 Wn. App. at 458. Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008).

In Mr. McGregor's case, defense counsel provided deficient performance by failing to object to testimony that there had been four or five other suspicious fires in the area, that a police sergeant had seen Mr. McGregor outside of one of those previous fires, that the fire kitty-corner to the one for which Mr. McGregor was charged was also suspicious, and that the sergeant believed that the same person had started the two large house fires, in addition to the small amount of charring with which Mr. McGregor was charged. RP (11/7/17) 32, 41, 43; RP (11/8/17) 204-05.

If Mr. McGregor's attorney had objected, the proper inquiry under ER 404(b) would have determined that the evidence was inadmissible.

Slocum, 183 Wn. App. at 448. First, the state could not establish by a preponderance of the evidence that Mr. McGregor had been involved in the other fires. *Id.* Rather, the police sergeant and fire captain merely suspected that the fires had been committed by the same person as the one with which he was charged. Second, the evidence was not offered for any proper purpose. *Id.* Its only potential relevance was to create exactly the type of propensity inference that ER 404(b) is designed to prohibit. Or, perhaps even worse, to encourage the jury to convict Mr. McGregor because he was potentially a serial arsonist even if they did not believe that the charge related to the charring had been proved beyond a reasonable doubt. Third, the evidence was not relevant to prove any element of the charge against Mr. McGregor. *Id.* Finally, the risk of unfair prejudice stemming from the evidence outweighed any limited probative value. *Id.*; ER 403.

The evidence was also inadmissible because it constituted speculation, rather than valid expert opinion. *See* ER 703; *Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835 (2001) (conclusory or speculative expert opinions that lack an adequate foundation is not admissible). But Mr. McGregor's attorney failed to object on that basis as well. RP (11/7/17) 32, 41, 43; RP (11/8/17) 204-05

Defense counsel had no valid tactical reason for waiving objection to the extensive evidence speculating that Mr. McGregor was guilty of other un-charged arsons. No reasonable strategic end was achieved by exposing the jury to evidence that Mr. McGregor may have been involved in numerous fires that were far larger than the one for which he was charged. Counsel's performance fell below an objective standard of reasonableness. *Jones*, 183 Wn.2d at 339.

Mr. McGregor was prejudiced by his attorney's deficient performance. The evidence against Mr. McGregor was not overwhelming. The state was unable to produce any kind of incendiary device with which he was alleged to have caused the charring. *See RP generally*. No witness had seen Mr. McGregor at or near the location of the fire on the night that it happened. *See RP generally*. Mr. McGregor's expert witness provided concrete evidence that the fire may have been electrical in nature – a possibility that was never fully investigated by the police and fire officials. RP (11/9/17) 38-41. But the evidence speculating that Mr. McGregor was actually a serial arsonist strongly encouraged the jury to convict him based on that possibility, even if there remained a reasonable doubt as to his guilt of causing the charring on the garage door. There is a reasonable probability that defense counsel's unreasonable failure to object affected the outcome of Mr. McGregor's trial. *Id.*

Mr. McGregor's defense attorney provided ineffective assistance of counsel by failing to protect his client from extensive, highly-prejudicial, inadmissible evidence. *Id.* Mr. McGregor's conviction must be reversed. *Id.*

II. POLICE OFFICER TESTIMONY THAT MR. MCGREGOR TERMINATED QUESTIONING AND ASKED FOR AN ATTORNEY VIOLATED DUE PROCESS BECAUSE IT WAS A DIRECT COMMENT ON MR. MCGREGOR'S EXERCISE OF HIS RIGHTS TO SILENCE AND TO COUNSEL.

The constitution protects both the right to remain silent in the face of police questioning and the right to consult with counsel during such questioning. *State v. Romero*, 113 Wn. App. 779, 786–87, 54 P.3d 1255, 1260 (2002); *State v. Easter*, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996); *Escobedo v. State of Ill.*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964); U.S. Const. Amend. V, VI, XIV.³

The exercise of these rights is not evidence of guilt of a crime. *Romero*, 113 Wn. App. at 787; *Easter*, 130 Wn.2d at 236; *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). The state violates an accused person's right to due process by exploiting or commenting upon exercise of those rights during trial. *Id.* (citing *Doyle v. Ohio*, 426 U.S. 610, 619, 96

³ Improper comment on an accused person's exercise of his/her *Miranda* rights can be raised for the first time on appeal under RAP 2.5(a)(3). *State v. Keene*, 86 Wn. App. 589, 592, 938 P.2d 839, 841 (1997); *State v. Curtis*, 110 Wn. App. 6, 11, 37 P.3d 1274, 1276 (2002); *State v. Pottorff*, 138 Wn. App. 343, 346, 156 P.3d 955, 957 (2007).

S.Ct. 2240, 49 L.Ed.2d 91 (1976)); *State v. Fricks*, 91 Wn.2d 391, 395–96, 588 P.2d 1328 (1979)); U.S. Const. Amend. XIV. This is because commenting upon a person’s exercise of his/her *Miranda* rights during police questioning violates the implicit assurance that the exercise of those rights carries no penalty. *State v. Nemitz*, 105 Wn. App. 205, 214, 19 P.3d 480, 485 (2001) (*citing Easter*, 130 Wn.2d at 236). Indeed, the right to silence can be “just as effectively [circumvented] by questioning the arresting officer or commenting in closing argument as by questioning defendant himself.” *Easter*, 130 Wn.2d at 236 (*quoting Fricks*, 91 Wash.2d at 396).

Accordingly, “[a] police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions.” *Romero*, 113 Wn.App. at 787 (*quoting Lewis*, 130 Wash.2d at 705). If a police officer’s testimony directly comments on the defendant’s exercise of his/her *Miranda* rights, a constitutional error has occurred. *Id.* at 790; *State v. Holmes*, 122 Wn. App. 438, 445, 93 P.3d 212, 216 (2004).

This is true even when the prosecution does not purposely elicit the comment or exploit it during argument. *See Romero*, 113 Wn. App. at 794. Even comments that are given as unresponsive answers to questions by the state act to denigrate the defense and encourage the jury to convict based on the reasoning that the exercise of *Miranda* rights is “more consistent

with guilt than with innocence.” *Romero*, 113 Wn. App. at 794 (*quoting Curtis*, 110 Wn. App. at 14).

In Mr. McGregor’s case, the arresting officer directly commented on his exercise of his rights to counsel and to silence by clearly informing the jury that he had ended a post-arrest police interview related to the charges by asking for an attorney. RP (11/7/17) 38.

This constitutional error requires reversal because the state cannot establish harmlessness beyond a reasonable doubt. *Romero*, 113 Wn. App. at 794-95; *Easter*, 130 Wash.2d at 242.

First, the “bell” of such a comment is “hard to unring.” *Holmes*, 122 Wn. App. at 445. It also puts defense counsel in the difficult position of “gamb[ing] on whether to object and ask for a curative instruction—a course of action which frequently does more harm than good—or to leave the comment alone.” *Id.* (*citing Curtis*, 110 Wn. App. at 15).

Second, the untainted evidence against Mr. McGregor was not overwhelming. As noted above, the state was unable to produce the ignition device that allegedly caused the charring or to place Mr. McGregor at the scene of the fire. *See RP generally*. The investigative crew also failed to independently rule out an electrical source to the fire. *See RP (11/8//17) 226; RP (11/9/17) 38-41*. The state cannot establish that the officer’s direct comment on Mr. McGregor’s choice to exercise his

constitutional rights was harmless beyond a reasonable doubt. *Romero*, 113 Wn. App. at 794-95.

Finally, the timing of Mr. McGregor's exercise of his rights exacerbated the prejudice. The state's theory was that the person who caused the charring had used a can of WD-40 as a kind of blow torch. RP (11/8/17) 214; RP (11/9/17) 105-27. The officer told the jury that Mr. McGregor cut off questioning and asked for an attorney immediately after he asked him about the use of any flammable liquids. RP (11/7/17) 38. This sequence of events encouraged the jury to infer that Mr. McGregor had invoked his *Miranda* rights only because he was confronted with the evidence specific to the charge against him.

The arresting officer's direct comment on Mr. McGregor's invocation of his right to counsel and to remain silent violated due process because it undermined the inherent assurance that exercise of those rights carries no penalty. *Nemitz*, 105 Wn. App. at 214; *Easter*, 130 Wn.2d at 236. Mr. McGregor's conviction must be reversed. *Id.*

III. THE CUMULATIVE EFFECT OF THE ERRORS AT MR. MCGREGOR'S TRIAL VIOLATED HIM OF HIS RIGHT TO A FAIR TRIAL BY STRONGLY ENCOURAGING THE JURY TO CONVICT HIM FOR REASONS UNRELATED TO THE EVIDENCE OF THE CHARGE AGAINST HIM.

Under the doctrine of cumulative error, an appellate court may reverse a conviction when "the combined effect of errors during trial

effectively denied the defendant [his/]her right to a fair trial even if each error standing alone would be harmless.” *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010).

In Mr. Taylor’s case, the cumulative effect of defense counsel’s failure to object to extensive, speculative testimony that he had been involved in numerous other suspicious fires and of officer testimony directly commenting on his exercise of his *Miranda* rights strongly encouraged the jury to find guilt based on factors wholly unrelated to the evidence of the actual charge against him. The cumulative effect of the errors at Mr. McGregor’s trial deprived him of a fair trial and requires reversal of his conviction. *Id.*

IV. THE SENTENCING COURT EXCEEDED ITS AUTHORITY BY ORDERING MR. MCGREGOR TO PAY \$1,300 TOWARD THE COST OF HIS DEFENSE, WHILE ALSO FINDING HIM INDIGENT AND WITHOUT CONDUCTING ANY INQUIRY INTO HIS ABILITY TO PAY.

Mr. McGregor was found indigent at both the beginning and the end of proceedings in the trial court. CP 4, 68-69. Still, the court ordered him to pay \$650 in attorney’s fees as well as \$650 toward the cost of his defense expert. CP 57-58.

At the same time, the court did not conduct any particularized inquiry into Mr. McGregor’s financial situation at sentencing or at any other time. *See* RP (11/15/17). The court erred by ordering Mr. McGregor

to contribute to the cost of his defense absent any indication that he had the means to do so.⁴

At the time of Mr. McGregor's sentence, statute mandated that "[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them." *Former* RCW 10.01.160(3) (2017); *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 685 (2015) (emphasis added by court).⁵ This imperative language prohibited a trial court from ordering LFOs absent an individualized inquiry into the person's ability to pay. *Id.* Boilerplate language in the Judgment and Sentence is inadequate because it does not demonstrate that the court engaged in an individualized analysis. *Id.* The court must consider personal factors such as incarceration and the person's other debts. *Id.*

Notably, RCW 10.01.160 has been very recently amended to completely prohibit the imposition of any costs on an accused person who is indigent. *See current* RCW 10.01.160(3) (effective as of 06/17/18);

⁴ Mr. McGregor's defense attorney included the \$650 attorney's-fees aware in a list on his sentencing memorandum to the court. CP 48. If that error waives consideration of this issue on appeal, then it constituted ineffective assistance of counsel because defense counsel had no reasonable purpose for recommending that his indigent client be required to pay \$650 and Mr. McGregor was prejudiced by the imposition of the fee. *Jones*, 183 Wn.2d at 339.

⁵ An appellate court may decline to consider a claim that was not made before the trial court. But the Washington Supreme Court has repeatedly exercised its discretion to review issues related to the improper imposition of legal financial obligations based on the significant burden the practice places on indigent defendants and the difficulty it poses to successful reentry to society. *Id.*; *See also Blazina*, 182 Wn.2d at 835-37. This court should follow the Supreme Court's lead and address this issue in Mr. McGregor's case.

LAWS OF 2018, ch. 269. If Mr. McGregor had been sentenced a mere seven months later, the court would have been categorically proscribed from ordering him to pay the \$1300 toward the cost of his defense.

Even at the time of his sentencing, however, the court's LFO order exceeded its statutory authority because the court failed to conduct any meaningful inquiry into Ms. McGregor's ability to pay LFOs. *See* RP (11/15/17). The court did not consider his financial status in any way. Indeed, the court also found Mr. McGregor indigent at both the beginning and the end of the proceedings in trial court. *See* CP 4, 68-69.

Foreshadowing the recent amendment to the statute, the *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* (“[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs”). Because he is indigent, the court should have presumed that Mr. McGregor was unable to pay the cost of his defense. *Id.*

The court erred by ordering Mr. McGregor to pay \$1300 toward the cost of his defense absent any showing that he had the means to do so. *Blazina*, 344 P.3d at 685; *Former* RCW 10.01.160(3) (2017). That order must be stricken from the Judgment and Sentence. *Id.*

CONCLUSION

Mr. McGregor's defense attorney provided ineffective assistance of counsel by failing to object to extensive, inadmissible, highly-prejudicial speculation that he was a serial arsonist. Mr. McGregor's right to due process by violated by direct officer comment on his exercise of his *Miranda* rights. Whether considered individually or cumulatively, these errors require reversal of Mr. McGregor's conviction.

In the alternative, the sentencing court exceeded its authority by ordering Mr. McGregor to pay \$1,300 toward the cost of his defense. Those fees must be stricken from the Judgment and Sentence.

Respectfully submitted on August 12, 2018,



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Albert McGregor
520 Karr Ave, Apt 3
Hoquiam, WA 98550

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

Grays Harbor County Prosecuting Attorney
appeals@co.grays-harbor.wa.us

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

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on August 12, 2018.



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

LAW OFFICE OF SKYLAR BRETT

August 12, 2018 - 3:34 PM

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