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Division II  
State of Washington  
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NO. 52420-1-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

HARRY K. WAYMOTH, III

Appellant.

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

The Honorable John Skinder, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. Appellant Harry Waymoth was deprived of his right to effective representation of counsel under the Sixth Amendment of the Federal Constitution and article I, section 22 of the Washington Constitution, rendering his plea involuntary.

2. Due process requires a guilty plea to be knowing, voluntary, and intelligent. The trial court erred in denying the motion for the appellant to withdraw his guilty plea when he entered the plea because his attorney did not provide effective representation during the plea bargaining process.

3. The interest accrual provision imposed at sentencing is no longer authorized after enactment of House Bill 1783 and should be stricken.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was the appellant deprived of his right to effective assistance of counsel, where counsel advised Mr. Waymoth following a ruling allowing introduction of child hearsay that there was no method to introduce defense witness testimony regarding false allegations of sexual misconduct made by the complaining witness A.R.E. against another person, where the court had not made a ruling denying the witness testimony, and where it was unknown if A.R.E. would deny the allegations at trial, and where trial counsel had not investigated other pathways to introduce the evidence of prior false accusations prior to the appellant's guilty plea? Assignment of Error 1.

2. Whether the trial court erred in failing to allow the appellant to withdraw his guilty plea when he entered the plea because his attorney had not provided effective assistance of counsel? Assignment of Error 2.

3. Whether the trial court erred in failing to allow the appellant to withdraw his guilty plea when he entered the plea under pressure and where he had only reviewed the plea offer for ten to fifteen minutes on the morning of trial? Assignment of Error 2.

4. Should the interest accrual provision in the Judgement and Sentence that is no longer authorized after enactment of House Bill 1783 be stricken? Assignment Error 4.

**C. STATEMENT OF THE CASE**

**1. Procedural facts:**

Harry Waymoth III was charged by information filed on November 28, 2018 in Thurston County Superior Court with two counts of first degree rape of a child, contrary to RCW 9A.44.073 (Counts 1 and 2); two counts of first degree child molestation, contrary to RCW 9A.44.083 (Counts 3 and 4); and one count of third degree assault of a child (domestic violence), contrary to RCW 9A.36.140(1), RCW 9A.36.031(1)(f) (Count 5). The State filed a first amended information on February 5, 2018. Clerk's Papers (CP) 30-31. The State alleged that Mr. Waymoth committed the offenses against A.R.E. between March 1, 2017 and November 21, 2017, and that A.R.E. was less than twelve years old at the time of the alleged offenses. CP 30-31.

The case came on for trial on February 6, 2018, the Honorable John Skinder presiding. Report of Proceedings<sup>1</sup> (RP) (2/6/18) at 112-134.

**a. Child hearsay hearing:**

On February 5, 2018, the day prior to trial, the court heard testimony on child hearsay pursuant to RCW 9A.44.120(a)(1), and also heard motions in limine. RP (2/5/18) at 1-111. Prior to the start of the hearing, Mr. Waymoth told the court that he had rejected the State's plea offer and that he was "comfortable to proceed to trial." RP (2/5/18) at 13.

The court heard testimony from the complaining witness A.R.E., who was seven years old at the time of the hearing. RP (2/5/18) at 17-33.

Detective James Williams testified that he conducted an interview with A.R.E. on November 22, 2017 following a report of physical abuse of A.R.E. discovered by staff at her elementary school. RP (2/5/18) at 37, 38. A.R.E.'s school counselor Michelle Zodrow was present for the interview. RP (2/5/18) at 40. Detective Williams, who stated that he was there following a report of bruises allegedly seen on A.R.E., testified that A.R.E. said there was "a secret" with Mr. Waymoth when the detective asked "so what do you and Harry like to do for fun?" RP (2/5/18) at 41. He stated

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<sup>1</sup>The record of proceedings consists of the following transcribed volumes: RP – December 12, 2017 (arraignment), January 31, 2018, March 15, 2018, April 9, 2018, and August 1, 2018; RP – February 5, 2018 (jury trial, day 1, child hearsay hearing), February 6, 2018 (jury trial, day 2, change of plea); RP – August 13, 2018 (motion to withdraw guilty plea and sentencing); and RP – May 21, 2018.

that after continuing to talk with her, A.R.E. pointed downward and said that “he touched me there,” and that she pointed to her crotch area and also whispered to Detective Williams that “he licks it too.” RP (2/5/18) at 44, 45, 46. Detective Williams said that A.R.E. said that Mr. Waymoth touched her with a “purple thing” that he would rub on her vagina, which the detective stated was a vibrator RP (2/5/18) at 47. He stated that the incidents all took place in A.R.E.’s mother’s bedroom. RP (2/5/18) at 47.

Michelle Zodrow, A.R.E.’s first grade school counselor in 2017, testified regarding the interview at the school, saying that A.R.E. said that Mr. Waymoth does things to her like he does to her mother and that A.R.E. pointed to her vaginal area and said that he touches her where she pees. RP at 62, 65. She said that A.R.E. told them that Mr. Waymoth uses a long thing and touches her with it where she pees, and that she had tasted something that comes out of a boy’s part where he pees and that it did not taste good, and that Mr. Waymoth had put his mouth on her private part. RP at 66-67.

The court reviewed the nine *Ryan*<sup>2</sup> factors and found that A.R.E.’s statements to Detective Williams and as witnessed by Ms. Zodrow were admissible under RCW 9A.44.120. RP at 95-96.

After the court’s ruling regarding admissibility of child hearsay, defense counsel Kevin Griffin stated that ER 608 permits inquiry into

specific instances of conduct bearing on witness credibility, and that he had two witnesses to testify regarding prior accusations by A.R.E. because she:

has previously made an accusation against Mr. Morrell, and there were witnesses to the conduct and to the accusation, and in their opinion the accusation was clearly false. If I can be very specific, Mr. Morrell was visiting their home, was using the restroom, and the child came in and then came out and told people there that Mr. Morrell had exposed himself to her.

RP at 100.

Mr. Griffin stated that he would be seeking permission from the court to specifically inquire regarding the incident. RP at 101. The State argued that under ER 608, the defense could ask A.R.E. about specific instances of accusations, but it would have to be during cross-examination and could not be offered through extrinsic evidence, and that if A.R.E. denied knowledge of the incident, it would then fall under ER 404(b). RP at 103.

The court stated:

I'm not prepared to rule, but it would appear that you both are talking about similar approaches, but coming at it from slightly different angles. The law is the law here, and I'm not certain whether we're going to get to the point of that particular allegation, but I think at this point what would be appropriate is there will not be any mention of this incident involving Mr. Morrell's allegation that [A.R.E.] accused him of exposing himself to her unless you have ruling from the court and any argument or mention of that would only occur outside the presence of the jury until that point.

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<sup>2</sup>*State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

RP at 104.

On the following day, February 6, 2018, counsel indicated the defense had reached a resolution of the case. RP at 113-15. Mr. Waymoth agreed to plead guilty to amended charges of two counts of first degree child molestation and third degree assault as charged in Counts 3, 4, and 5, and in exchange the State would dismiss the charges of first degree rape in Counts 1 and 2. RP at 112; CP 36-47.

***b. Change of plea***

Mr. Waymoth entered a change of plea on February 6, 2018, in which he pleaded guilty to Counts 3, 4, and 5, and the State dismissed Counts 1 and 2. RP at 117-127; CP 36-47. The State's recommendation was for 96 months to life, a sexual deviancy evaluation, and legal financial obligations. CP 39.

Mr. Waymoth stated he was pleading guilty because he felt he had no other option. The following exchange took place:

[MR. WAYMOTH] Sorry. Being what me and my attorney had discussed, this being the best option in light of having our evidence denied for trial, so it's either this or we go to trial with absolutely nothing, so it's not really an option of if I'm willing to do this; it's either this or life in prison basically.

THE COURT: Mr. Griffin, your client made a comment, and I don't want to question him necessarily about his understanding of evidentiary rulings, but I'm concerned. The court didn't make a ruling yesterday that — denying the defense any evidence.

MR GRIFFIN: Judge, with a lot of respect to my client, I don't believe we've characterized it that way. We did specifically discuss how the evidence rules operate in a case like this in a way that could permit the court to prohibit the introduction of prior false allegations of a sexual nature. I had a chance to research that issue again last night. We discussed in particular *State v. Lee*, a Supreme Court case from this past year which would appear to support the authority that was referenced by the court.

RP at 118-19.

The Court acknowledged that it had not made a definitive ruling on the proffered testimony of a false accusation against Mr. Morrell. RP at 119-20.

Mr. Waymoth stated later during the hearing:

What I want to do, Your Honor, is prove my innocence. Unfortunately, with the motion that was put through being that it wasn't guaranteed whether it was going to be declined or approved, that really kind of kills our case and brings up the fact that I don't really have much of an option if I – if I can't have my witnesses come in and talk about the prior incidents, then there would be no way that I would be able to win, absolutely no way. I have full confidence that had I been allowed to do that then I would be able to, you know, win this case, like one hundred percent. That's been my whole thing. With that motion put in, even though it hadn't been approved or denied, it leaves too much for me to worry about being with fact that I honestly, personally feel that my hands are tied. So when you mentioned, you know, signing this voluntarily, yeah, I move my own hand and I signed it, but I don't feel that I did it in a voluntary manner. I felt like my hands were tied. Because I don't feel that with that motion hanging there that there's any guarantee that my witnesses would be able to take the stand to defend me.

RP at 122-23.

On February 7, 2017, the day after entry of the plea, Mr. Waymoth

told his attorney Kevin Griffin that he had found new information using a tablet “law library” and that he wanted to withdraw his plea. RP at 27-28. Mr. Griffin filed a motion and affidavit on February 28, 2018 to withdraw as counsel, stating in part that Mr. Waymoth was asserting ineffective assistance of trial counsel in support of his request to withdraw his plea. CP 51-54. Mr. Griffin was permitted to withdraw from the case on March 15 and new counsel was appointed. CP 51-54.

**c. Motion to withdraw plea**

On May 10, 2018, Mr. Waymoth filed a pro se motion to withdraw his guilty plea, alleging that he received ineffective assistance of counsel from his previous attorney Mr. Griffin. CP 69-75. He stated that if his counsel had reviewed ER 602 and ER 607 and relayed the information to him prior to the guilty plea, he would not have signed the change of plea form and would have instead proceeded to trial on February 6, 2018. CP 71. Mr. Waymoth’s new counsel filed a motion and supporting memorandum on May 30, 2018, alleging ineffective assistance of counsel. CP 79-83.

The motion was heard August 13, 2018. RP (8/13/18) at 4-86. Mr. Waymoth’s counsel argued that Mr. Waymoth was under “an enormous amount of pressure” at the time he entered the plea on the morning of trial on February 6, 2018. RP (8/13/18) at 8. Counsel also argued that Mr. Waymoth thought that he would allowed to withdraw his plea if he realized that he had made a mistake, and that within hours of entering the plea, “he

realized that he had just basically succumbed to the pressure and wasn't thinking straight and had a misunderstanding of the law," and therefore told his lawyer within hours of making the plea that he wanted to withdraw it. RP (8/13/18) at 8-9.

Mr. Waymoth testified that he has consistently maintained his innocence in the case and never considered change of plea, and that he had told his attorney that he did not want to accept previous offers made by the State. RP at 19-20. He stated that following the child hearsay hearing on February 5, his attorney told him during a meeting at the jail that evening that the defense would be unable to call their witnesses to provide testimony regarding false accusations made by A.R.E. against other people. RP at 20. Mr. Waymoth stated that he was worried about not being able to call the defense witnesses and was told by Mr. Griffin that he would not be able to call the witnesses under ER 608. RP at 22. He stated that Mr. Griffin did not see any possible way of calling the witnesses. RP at 23. At the end of the meeting, which lasted 20 to 30 minutes, Mr. Waymoth asked if the State had a plea offer that he could consider. RP at 23.

Mr. Waymoth stated that after he returned to his cell he decided that he did not want to take a plea. RP at 24. When he was brought to court the morning of February 6, 2018, he asked his attorney if he had found a way "to get around 608 for our defense," and was told that he was not able to find anything and then his attorney showed him the State's offer. RP at 25.

Mr. Waymoth stated that he asked counsel that if he found “something new” that would help the defense case, could the plea be withdrawn, and was told by counsel that it could be withdrawn without specifying that withdrawal of a plea would be difficult. RP at 25. Mr. Waymoth stated that he was told by counsel that the court “was going to rule in favor of the prosecution like the Court had said they most likely would, and, in that case, we would lose all chances of calling witnesses[.]” RP at 25-26. Mr. Waymoth was given the new offer between 8:00 a.m. and 9:00 a.m., and discussed it for ten to fifteen minutes. RP at 26.

After he entered his plea he had access to a “portable law library” on a tablet and read ER 602 and ER 607, which were not discussed by Mr. Griffin. RP at 28-29. Mr. Waymoth said he was excited about his research and believed the Evidence Rules would allow the defense to call the witnesses and told his attorney that he wanted to withdraw his plea. RP at 29. He stated that after the meeting on February 7, he also learned about habit and routine evidence pursuant to ER 406. RP at 30. He said that when he entered the plea, he felt he no other option and that the trial court judge had stated that he “would most likely rule in favor of the prosecution halfway through trial” and that he “felt backed int a corner” because if the court ruled in favor the prosecution, he would not be able to call the witnesses. RP at 32, 36.

Mr. Griffin testified that the State made an offer prior to trial for a

reduction in charges, but that the offer would be withdrawn if the defense requested an interview with A.R.E. RP at 48. The defense rejected the offer and interviewed A.R.E. RP at 48-49. Mr. Griffin testified that A.R.E. “provided fairly consistent information to what” she had previously told police. RP at 50. He stated that he thought there was “a risk [that A.R.E.] could be seen as credible[.]” RP at 52. Mr. Griffin stated that the defense investigated two incidents in which A.R.E. “may have made a prior false complaint,” and that he had three witnesses regarding those incidents. RP at 53. Mr. Griffin stated that he made a summary of what he expected the witnesses to say and “a short summary of why I was asking the Court to find it relevant and admissible, and I recall the Court reminding me of some of the limitations in 608 that it may not permit it.” RP 53-54. He stated that they did not have a formal ruling on the admissibility of the witnesses. RP at 54. Mr. Griffin stated that at trial the defense:

would have presented an argument that either the Court was incorrect, which of course I think that would have been our position, but it wasn’t absolutely a mandatory bar to this, but it certainly created a major obstacle for us.

So I can’t think of any other authority that would have specifically permitted it. We would have made an argument at that time. We believed the Court had not made a ruling but telegraphed that we likely would not have been able to offer that evidence in front of a jury.

RP at 54.

Mr. Griffin said that after meeting with Mr. Waymoth at the jail on

February 5, he contacted the prosecutor at about 9:45 p.m. to discuss a possible settlement. RP at 57. After a lengthy discussion, the State agreed to dismiss Count 1 and 2 in exchange for pleading to Count 3, 4, and 5, and a top of the standard range recommendation. RP at 57-58. Mr. Griffin told Mr. Waymoth about the terms of the offer. RP at 58. Mr. Griffin stated that the prosecution indicated that it was going to use ER 608 to prevent the defense from presenting witnesses that would have testified that A.R.E. had previously accused other people. RP at 63. His concern was that A.R.E. said very little during the defense interview and that the State had prevailed at the child hearsay hearing. RP at 64. He stated that it “sounded accurate” when told that Mr. Waymoth had contacted him the next day to withdraw his guilty plea. RP at 67.

The court denied the motion, reasoning Mr. Griffin did not perform deficiently and that Mr. Waymoth made the decision to plead guilty knowingly, intelligently, and voluntarily, RP (8/13/18) at 86-87.

**d. Sentencing**

Following the denial of the motion, the court proceeded with sentencing. RP (8/13/18) at 87. The standard range for Counts 3 and 4 was 72 to 96 months to life and 4 to 12 months for Count 5. CP 93. The State recommended 96 months to life for Count 3 and 4. RP (8/13/18) at 90. Based on an offender score of “4,” the court imposed 96 months to life for Counts 3 and 4, to be served concurrently. RP (8/13/18) at 110-11; CP 96.

The court sentenced Mr. Waymoth to 12 months for Count 5, followed by 12 months of community custody. CP 96, 97. He was ordered to participate in sexual deviancy treatment and register as a sex offender upon release. CP 97. The court, apparently finding that Mr. Waymoth is indigent, imposed a \$500.00 crime victim assessment and \$100.00 filing fee, and reserved restitution. RP (8/13/18) at 112; CP 94-95. The judgment and sentence also stated that “[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.” CP at 95.

Timely notice of appeal was filed September 12, 2018. CP 111-125.

This appeal follows.

#### **D. ARGUMENT**

##### **1. TRIAL COURT ERRED IN DENYING WAYMOTH'S MOTION TO WITHDRAW HIS PLEA**

###### ***a. Counsel was ineffective under both prongs of Strickland***

This Court should allow Waymoth to withdraw his plea to correct a manifest injustice. Waymoth's plea was the product of ineffective assistance of counsel.

A motion to withdraw made before judgment must comply with CrR 4.2(f), which provides that a motion to withdraw a plea shall be allowed whenever it is necessary to correct a manifest injustice. CrR 4.2(f). The

defendant must demonstrate that a manifest injustice occurred. *State v. Hurt*, 107 Wn. App. 816, 829, 27 P.3d 1276 (2001). “Manifest injustice” means “injustice that is obvious, directly observable, overt, not obscure.” *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991); *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Nonexclusive indicia of a manifest injustice include: non ratification of a plea by the defendant or his representative; in voluntariness of the plea; failure by the prosecutor to keep the plea agreement; and denial of effective assistance of counsel. *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996); *Saas*, 118 Wn.2d at 42.

A trial court must examine the “totality of circumstances” when deciding whether a manifest injustice exists. *State v. Stough*, 96 Wn. App. 480, 485, 980 P.2d 298, review denied. 139 Wn.2d 1011 (1999).

A court reviews de novo a trial court's denial of a motion to withdraw a guilty plea that is based on ineffective assistance of counsel. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

**b. *Mr. Waymoth was denied effective representation because counsel failed to correctly advise him during plea negotiations***

Every criminal defendant is guaranteed the right to the effective

assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). See U.S. Const. amend. VI; Const. art. I, § 22. A court reviews ineffective assistance of counsel claims de novo. *State v. Jones*, 183 Wn.2d 327, 338-39, 352 P.3d 776 (2015).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

To establish the first prong of the *Strickland* test, the defendant must show that “counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances.” *Thomas*, 109 Wn.2d at 229-30.

To establish the second prong, the defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case” in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*,

109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

Performance is deficient if it falls “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice exists if there is a reasonable probability that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009); *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The defendant must affirmatively prove prejudice and show more than a “ ‘conceivable effect on the outcome’ ” to prevail. *State v. Crawford*, 159 Wash.2d 86, 99, 147 P.3d 1288 (2006) (quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052).

“In the context of plea bargains, effective assistance of counsel means that defense counsel actually and substantially assist his client in deciding whether to plead guilty.” *State v. Holley*, 75 Wn.App. 191, 197, 876 P.2d 973 (1994) (citing *State v. Malik*, 37 Wn.App. 414, 416, 680 P.2d 770 (1984)). It is counsel's responsibility to aid the defendant “in evaluating the evidence against him and in discussing the possible direct consequences of a guilty plea.” *Malik*, at 417. “The lawyer’s goal is to equip a client

with the tools needed to make a knowing, voluntary and intelligent decision. *State v. Stough*, 96 Wn. App. 480, 486, 980 P.2d 298 (1999).

Ineffective assistance of counsel means that counsel failed to actually and substantially assist the client in deciding whether to plead guilty, and but for counsel's failure, the client would not have pleaded guilty. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); *State v. McCollum*, 88 Wash.App. 977, 982, 947 P.2d 1235 (1997), review denied, 137 Wash.2d 1035, 980 P.2d 1285 (1999); *State v. Garcia*, 57 Wn. App. 927, 932-33, 791 P.2d 244, review denied, 115 Wn.2d 1010 (1990).

Due Process requires an affirmative showing that a defendant entered a guilty plea intelligently and voluntarily. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996); see *State v. Zumwalt*, 79 Wn. App. 124, 901 P.2d 319 (1995) (plea of guilty involuntary when defendant was not adequately informed by his counsel that there was an insufficient factual and legal basis to support the deadly weapon charge).

First, it is apparent from the circumstances that Mr. Waymoth was under pressure during the plea negotiation process. He testified that he had discussed the potential plea with counsel for ten to fifteen minutes on February 6. RP (8/13/18) at 26-27. Plea bargaining pressures may render a plea involuntary. *State v. Frederick*, 100 Wn.2d 550, 556, 674 P.2d 136

(1983), overruled on other grounds, *Thompson v. Department of Licensing*, 138 Wn.2d 783, 794, 982 P.2d 601 (1999). This pressure, however, is in conjunction with the greater pressure he felt to plead guilty after being led to believe by counsel that he had no other option following the child hearsay hearing on February 5.

***b. Evidence of A.R.E.'s prior false accusations of sexual misconduct***

Although not formally made as an offer of proof, Mr. Griffin detailed the testimony the defense wanted to introduce and how this undermined A.R.E.'s credibility and provided a reason to doubt the allegations made against Mr. Waymoth. RP at 100. The prior bad acts of A.R.E. were relevant to her credibility. The plea was based on ineffective assistance counsel in the form of erroneous advice; Mr. Griffin incorrectly advised Mr. Waymoth to “fold his tent” and plead to the new offer obtained by Mr. Griffin on the eve of trial.

The Sixth and Fourteenth Amendments guarantee an accused person the right to a meaningful opportunity to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct 1727, 164 L.Ed.2d 503 (2006); U.S. Const. Amends. VI, XIV. Article I, section 22 of the Washington Constitution provides a similar guarantee. *State v. Maupin*, 128 Wn.2d

918, 924, 913 P.2d 808 (1996).

A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide “where the truth lies.” *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). “[A]t a minimum, . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts.... [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”

*Washington*, 388 U.S. at 19.

Evidence of a witness's character, trait of character, or other wrongs or acts are “not admissible for the purpose of proving action in conformity therewith on a particular occasion” except as provided in ER 607, 608, and 609. ER 404(a)(3).

***i. The evidence was relevant.***

Relevant evidence tends to make a material fact more or less

probable. ER 401. Relevant evidence is generally admissible. ER 402. Evidence of A.R.E.'s prior false accusation was plainly relevant.

***ii. Counsel could not be certain that he would be precluded from introducing evidence of false accusations under ER 608(b)***

Here, counsel advised Mr. Waymoth that it was not possible to introduce the testimony of false accusations by A.R.E. RP at 25-26. Mr. Griffin, however, had not moved for introduction of the testimony and the court had not ruled on the issue. Instead, Mr. Griffin viewed the court as “telegraphing” what its ruling would be. RP at 54.

Mr. Griffin’s concern, was, at the very least, premature. The court had not ruled on the issue. Moreover, it was unknown if A.R.E. would deny knowledge of the accusations. If she denied ever having made the accusations, it could be proved only by extrinsic evidence from defense witnesses and would, therefore, be inadmissible under ER 608.<sup>3</sup> However, counsel’s concern was needlessly premature until (1). A.R.E. denied and (2) the court ruled on a motion to admit the testimony of Mr. Morrell to impeach A.R.E.'s general character for truthfulness.

ER 608 provides that specific instances of a witness's conduct,

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<sup>3</sup> “Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, ... may not be proved by

introduced for the purpose of attacking his or her credibility, may not be proved by extrinsic evidence, but may “in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness ... concerning the witness' character for truthfulness or untruthfulness.” ER 608(b) Evidence Rule 608(b) states:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness[.]

ER 608(b).

Thus, the trial court may allow a party on cross-examination to challenge the veracity of a witness by inquiring about any fact “which goes to the trustworthiness of the witness . . . if it is germane to the issue.” *State v. York*, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). The specific past conduct of the witness, probative of the witness' credibility, may only be proved by questioning during examination of the witness and not by any extrinsic evidence. *State v. Simonson*, 82 Wn. App. 226, 234, 917 P.2d 599 (1996).

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extrinsic evidence.” ER 608(b).

Therefore the cross-examiner must "take the answer" of the witness and may not call a second witness to contradict the first as to whether the credibility-impeaching incident occurred. *State v. Barnes*, 54 Wn. App. 536, 540, 774 P.2d 547 (1989).

ER 607 governs the use of impeachment evidence. *In re Detention of Law*, 146 Wn. App. 28, 37, 204 P.3d 230 (2008). The rule states: "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." ER 607. Under ER 607, "a party has a right to cross-examine a witness to reveal bias, prejudice, or a financial interest in the outcome." *Law*, 146 Wn. App. at 37. Where the credibility of the complaining witness is crucial, his possible motive to lie is not a collateral issue. *State v. Lubers*, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996). Evidence of false accusations could have been admitted pursuant to ER 607.

In this case, it was simply unknown if A.R.E. would deny knowledge of the prior false allegations against Mr. Morrell. It was prejudicially ineffective for defense counsel to assume that A.R.E. would fail to answer the question truthfully.

***iii. The evidence could potentially have been offered under ER 404(b)***

Defense counsel did not move in limine for entry of the testimony, instead engaging in a “tea leaf” reading of the court’s statements regarding potential admission of the evidence, without benefit of filing a motion or formal briefing of the issue, to conclude that the defense was not going to be able to introduce the evidence of false accusations. RP at 101-04. Moreover, defense counsel did not move for admission of impeachment evidence under any other evidence rules. Under ER 404(b),

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

ER 404(b).

A prior bad act may be introduced against a witness, not to show conformity with that act, but in order to explain intent or plan. ER 404(b).

“ER 404(b) applies only to prior misconduct offered as substantive evidence.” *State v. Wilson*, 60 Wn. App. 887, 891, 808 P.2d 754 (1991). The rule is not limited to prior misconduct of a defendant; it also applies to the conduct of a witness. *State v. Young*, 48 Wn. App. 406, 412-13, 739 P.2d 1170 (1987).

Evidence of A.R.E.’s prior false accusation could have been

admitted pursuant to ER 404(b) to show motive to lie or intent to fabricate other false claims in this case against Mr. Waymoth.

Due to trial counsel's erroneous advice, these potential avenues for impeachment of A.R.E. through admission of evidence of false accusations were untested and unexplored.

Turning to the second *Strickland* prong, the deficient performance prejudiced Mr. Waymoth. Generally, as explained above, in the context of ineffective assistance, the defendant must show that but for defense counsel's failing, he would not have entered the plea. Here, Mr. Waymoth spoke at length at his change of plea hearing that he did not feel he was voluntary entering the guilty plea, that he felt his "hands were tied," that if his witness testimony could not be presented there "there would be no way that I would be able to win." RP at 122. Last, Mr. Waymoth stated that his plea was not made in "a voluntary manner." RP at 122.

Mr. Waymoth was incorrectly advised regarding admission of testimony regarding false allegations, and that (1) although the court had given a "preliminary" indication of the ruling, there was no actual motion before the court on the issue, (2) it was unknown what A.R.E.'s testimony would be regarding the prior accusation and whether she would admit or deny having made the accusations, and (3) other potential evidentiary

routes existed for admission of the evidence that was untried. Accordingly, Mr. Waymoth should be allowed to withdraw his plea as it was not voluntary, knowing and intelligent. Because Mr. Waymoth was deprived of his right to effective assistance of counsel during the plea bargaining process, this Court should allow him to withdraw his plea.

**2. THIS COURT SHOULD STRIKE THE  
INTEREST ACCRUAL PROVISION  
FOLLOWING HOUSE BILL 1783**

In 2018, the law on legal financial obligations changed when the legislature enacted Second Substitute House Bill (SSHB) 1783, effective June 7, 2018, which amended several statutes related to the imposition of discretionary costs on indigent defendants and interest on such costs. See LAWS OF 2018, ch. 269. In *State v. Ramirez*, 191 Wn.2d 732, 742, 426 P.3d 714 (2018), the Supreme Court held that these amendments applied to cases that are not yet final. *Ramirez*, 191 Wn.2d at 747-50. In *Ramirez*, an appellant challenged discretionary LFOs, arguing the trial court had not engaged in an appropriate inquiry regarding his ability to pay under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). *Rameriz*, 191 Wn.2d 732, 742, 426 P.3d 714 (2018). Because the defendant in *Ramirez* was indigent, the Supreme Court ordered the filing fee stricken. *Id.* at 748-50. Applying the change in the law, our Supreme Court in *Ramirez* ruled the trial court impermissibly imposed discretionary LFOs, including the \$200.00 filing fee. *Id.*

Here, the court waived non-discretionary fees. CP 95. Mr. Waymoth does not challenge imposition of the crime victim penalty assessment and DNA collection fee because indigency is not grounds to fail to impose the crime victim penalty assessment and because Mr. Waymoth had not previously had a DNA fee assessed.

Mr. Waymoth challenges the interest accrual on non-restitution LFOs assessed in Section 4.1 of the judgment and sentence. CP 95. The 2018 legislation eliminated the accrual of interest on non-restitution LFOs. The judgment and sentence states that financial obligations imposed by it shall bear interest from the date of the judgment until payment in full at the rate applicable to civil judgments. CP 95. Section 5(b) of the 2018 legislation states that as of its effective date “penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding shall not accrue interest.”

As amended, RCW 10.82.090 now provides:

- (1) Except as provided in subsection (2) of this section, restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of the effective date of this section [June 7, 2018], no interest shall accrue on non-restitution legal financial obligations.

See Laws of 2018, ch. 269.

Here, the judgment and sentence was filed August 13, 2018. CP 92. Accordingly, the interest accrual provision in the judgment and sentence pertaining to non-restitution LFOs should be stricken.

**E. CONCLUSION**

Mr. Waymoth's guilty pleas to were not knowing, intelligent and voluntary because he was not provided with effective assistance of counsel. This Court should reverse the superior court order denying his motion to withdraw his guilty plea and remand to the trial court to permit him to withdraw his plea.

Alternatively, Waymoth is entitled to relief from the statutory changes of House Bill 1783. this matter should be remanded to the sentencing court to strike the interest accrual provision to the extent it applies to non-restitution LFOs.

DATED: March 28, 2019.

Respectfully submitted,  
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

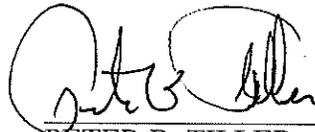
The undersigned certifies that on March 28, 2019, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Joseph Jackson Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 28, 2019.



PETER B. TILLER

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**March 28, 2019 - 4:50 PM**

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