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No. 53518-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ANDREW WILLIAMS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred when it admitted hearsay evidence that was not subject to a hearsay exception.

2. In violation of article IV, section 16 of the Washington Constitution, the court improperly commented on the evidence when it referred to the complainant by his initials in the to-convict instruction.

3. In violation of the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 3 of the Washington Constitution, the court violated Mr. Williams' right to the presumption of innocence when it redacted the complainant's name in the to-convict instruction.

4. In violation of article I, section 10, of the Washington Constitution, the court and the State violated Mr. Williams' right to an open court when it redacted the complainant's name in the to-convict instruction and in other court documents.

5. The court erred in issuing jury instruction 9.

6. The court erred when it rejected Mr. Williams' motion for a new trial based on ineffective assistance of counsel.

7. In violation of the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution, Mr. Williams' trial counsel failed to afford him the effective assistance of

counsel when he neglected to call material witnesses in his defense and neglected to meet regularly with Mr. Williams.

8. The court erred in finding “it was not in position to evaluate the credibility of the proposed testimony based on the defendant’s declaration,” and in finding Mr. Williams proposed testimony “would not render the verdict unreliable.” CP 74.

9. The court erred when it ordered Mr. Williams to pay discretionary legal financial obligations (LFOs) and to pay interest on these LFOs.

B. ISSUES

1. A court may admit hearsay statements if the declarant made the statement in order to seek medical treatment. The proponent of such evidence must demonstrate the declarant’s statement was “reasonably pertinent” to his treatment. To establish this, the proponent must demonstrate (1) the declarant’s motive in making the statement was to obtain treatment; and (2) the medical professional reasonably relied on the statement to treat the declarant. Here, the court admitted several prejudicial hearsay statements under this exception, but the State established neither that the declarant made the statements to obtain treatment, nor did it establish the medical professional relied on these statements to treat the declarant. Should this Court reverse because the

trial court admitted highly prejudicial hearsay statements that fail to meet any exception to the general rule prohibiting hearsay?

2. Article IV, section 16 prohibits judges from commenting on the evidence, including the credibility of witnesses. Here, after both parties and the court referred to the complainant by his entire name throughout the entire trial, the court used only his initials to refer to him in the to-convict instructions. Did the court comment on the evidence and signal the complainant was a rape victim when it used his initials in the jury instructions?

3. The Fourteenth Amendment and article I, section 3 provide defendants with the rights to due process of law and the presumption of innocence. Here, the court redacted the to-convict instruction, which signaled to the jury the court believed Mr. Williams raped the complainant. Did the court's actions undermine Mr. Williams' presumption of innocence and deny him his right to due process?

4. Article I, section 10 guarantees, "Justice in all cases shall be administered openly." Courts may not redact court documents without engaging in an on-the-record analysis. Did the court and the State's redaction of the complainant's name in several court documents violate article I, section 10, requiring reversal?

5. A court may grant a defendant a new trial if his counsel provided him with ineffective assistance and his counsel's deficient performance prejudiced him. Mr. Williams gave his trial counsel a list of witnesses who could undermine the complainant's credibility and allegations, but his trial counsel did not subpoena or produce these witnesses at trial. As Mr. Williams' case hinged on the complainant's credibility, did the court err when it denied Mr. Williams' motion for a new trial?

6. The LFO statutory scheme forbids courts from ordering indigent defendants to pay discretionary LFOs. Additionally, the statutes forbid courts from charging interest on non-restitution LFOs. The sentencing court imposed \$200 in discretionary LFOs, and the judgment and sentence ordered Mr. Williams to pay interest on his non-restitution LFOs. Should this Court remand so the court can strike the imposition of the discretionary LFOs and strike the provision that orders Mr. Williams to pay interest?

C. STATEMENT OF THE CASE

In February of 2016, Michael Williams and Joshua Pulliam worked together at a logistics company loading merchandise onto trucks. 8/30/18RP 337-38, 342-43. In the month prior, Mr. Pulliam's fiancée, Aislinn Turner, broke up with him. 8/30/18RP 414.

Shortly afterwards, Ms. Turner kicked Mr. Pulliam out of the apartment they shared because he started a fire in the apartment. 9/4/18RP 24, 37-38. Mr. Pulliam told Mr. Williams he had nowhere to go, so Mr. Williams offered to let Mr. Pulliam stay in his apartment. 8/30/18RP 343-44. Mr. Williams let Mr. Pulliam know he was bisexual as soon as he moved in, and Mr. Pulliam told Mr. Williams he was straight. 8/30/18RP 345, 416-17. Though Mr. Pulliam claimed Mr. Williams began to comment on his looks shortly after he moved in, the two had a friendly relationship in the weeks that followed Mr. Pulliam's move-in. 8/30/18RP 345, 358-59.

This relationship changed drastically on February 13, 2016. Mr. Williams procured a fake ID for Mr. Pulliam, who was only 20 at the time. 8/30/18RP 361-62. The two drank that evening at Mr. Williams' apartment before heading out to a bar. 8/30/18RP 357. When they went to the bar, Mr. Pulliam drank some more, and he ended up drinking six shots of liquor at the bar. 8/30/18RP 365, 368, 423. Mr. Pulliam was more intoxicated than Mr. Williams. 8/30/18RP 369. Though Mr. Pulliam initially claimed Mr. Williams provided him with all of the drinks, he later clarified the two alternated between buying each other drinks, with Mr. Pulliam largely buying his own drinks. 8/30/18RP 363, 365-66, 424-25.

The two went back to the apartment. At the apartment, Mr. Pulliam claimed Mr. Williams paced back and forth, started pulling his clothes off,

choked him, and repeatedly anally raped him. 8/30/18RP 374-75, 380-81. Mr. Pulliam also claimed that during the alleged rape, Mr. Williams bit him and licked him all over his body. 8/30/18RP 378-80.

Afterwards, Mr. Pulliam left the apartment and called Ms. Turner, hoping she could help him figure out a place to stay. 8/30/18RP 401. The two eventually met up, and Ms. Turner arranged for Mr. Pulliam to stay in a motel because “he wasn’t going to go back to the house with [her.]” 8/30/18RP 401-04; 9/4/18RP 32-33.

The next day, Mr. Pulliam called his father at Ms. Turner’s insistence. 8/30/18RP 404. At the time, Mr. Pulliam and his father were not speaking, as they were going through a “rough patch.” 8/30/18RP 404. Mr. Pulliam met up with his father, and his father took him to the hospital and called the police. 8/30/18RP 457.

A Sexual Assault Nurse Examiner (SANE), Monica Brown, conducted an examination of Mr. Pulliam. 9/4/18RP 71. She discovered some bruising on Mr. Pulliam’s neck, and he had petechiae on his eyes, which can be indicative of strangulation. 9/4/18RP 88, 94, 100. However, she also stated that drinking a significant amount of alcohol could cause this condition. 9/4/18RP 117. Additionally, although Mr. Pulliam claimed Mr. Williams repeatedly anally raped him, Mr. Pulliam did not have lacerations or significant injuries on his anus; instead, he had some

“general swelling.” 9/4/18RP 88, 106, 124-25. While Mr. Pulliam claimed Mr. Williams “dragged” him all over the floor during the alleged rape, Ms. Brown did not discover any marks, abrasions, or contusions on Mr. Pulliam’s shoulders, elbows, or on the palms of his hand. 8/30/18RP 380; 9/4/18RP 122. Ms. Brown collected several samples from Mr. Pulliam’s body and handed it to the police for analysis. 9/4/18RP 67-68.

A forensic scientist assessed this evidence. 9/4/18RP 141. Mr. Pulliam did not shower after the alleged rape and before the SANE examination. 9/4/18RP 115. Mr. Williams’ DNA was absent from Mr. Pulliam’s buttocks, anus, penis, and perineal-scrotal area. 9/4/18RP 75, 158-59, 165, 167. Mr. Williams’ DNA was only present on Mr. Pulliam’s neck. 9/4/18RP 115, 131, 168. The forensic scientist did, however, identify an unknown male’s semen mixed with Mr. Pulliam’s in his perineal-scrotal area, and the scientist found another unknown person’s saliva on Mr. Pulliam’s buttocks. 9/4/18RP 159-60, 167. An unknown individual’s saliva was also present on Mr. Pulliam’s neck. 9/4/18RP 168-69.

At trial, Mr. Williams objected to the admission of several of Mr. Pulliam’s statements that the State admitted via the SANE examiner, but the court denied his objections. *See* Part 1 of the Argument Section.

Additionally, the court issued a to-convict instruction that referred to Mr. Pulliam by his initials, J.P. CP 34.

The jury convicted Mr. Pulliam of one count of rape in the second degree. CP 38. After the verdict but before sentencing, Mr. Williams moved for new counsel, and the court granted the motion. 10/5/18RP 630-32. With new counsel appointed, Mr. Williams moved for a new trial based on his trial counsel's ineffective assistance of counsel; specifically, Mr. Williams asserted his counsel performed ineffectively when he neglected to call several key witnesses on his behalf. CP 45-47. The court denied the motion. CP 74; 5/24/19RP 656.

D. ARGUMENT

1. The court erred in admitting numerous prejudicial hearsay statements under the medical treatment exception, as the statements were not reasonably pertinent to Mr. Pulliam's medical treatment.

- a. Courts may only admit hearsay evidence if the evidence is admissible pursuant to a hearsay exception rule.

Hearsay is an out-of-court statement that the proponent offers to prove the truth of the matter asserted. ER 801(c). "Whether a statement is hearsay depends upon the purpose for which the statement is offered." *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 690, 370 P.3d 989 (2016) (quoting *State v. Crowder*, 103 Wn. App. 20, 26, 11 P.3d 828 (2000)). A statement is not hearsay if the proponent uses it only to show

its effect on the listener, without regard to the truth of the statement. *Gonzalez*, 193 Wn. App. at 690. But when an out-of-court statement is offered to the trier of fact for its truth, the statement is hearsay. *Id.*

Generally, hearsay evidence is inadmissible; however, if the evidentiary rules, court rules, and/or a statute permit(s) the admission of a specific category of hearsay evidence, then a court may admit the evidence at trial if it meets the specific category's criteria. ER 802; *State v. Huynh*, 107 Wn. App. 68, 74, 26 P.3d 290 (2001).

This Court reviews whether a statement was hearsay de novo. This is because ER 802 explicitly states hearsay evidence is inadmissible *except* as provided by the hearsay exception rules. *Gonzalez* 193 Wn. App. at 688- 89; *see also* ER 803, 804. "The rules do not give trial courts discretion to admit inadmissible evidence." *Id.* at 689.

- b. A court may admit a declarant's hearsay statements if the proponent establishes the declarant made the statement in order to seek medical treatment.

ER 803(a)(4) provides that a declarant's statements made for purposes of medical treatment or medical diagnosis are admissible, but only "insofar as reasonably pertinent to diagnosis or treatment." *In re Personal Restraint of Grasso*, 151 Wn.2d 1, 84 P.3d 859 (2004). The

proponent of ER 803(a)(4) evidence can establish that a declarant's statement was "reasonably pertinent" to treatment by demonstrating (1) the declarant's motive in making the statement was to promote treatment; and (2) the medical professional reasonably relied on the statement for purposes of treatment. *Id.* at 20. The proponent of this evidence bears the burden of establishing it meets the carefully drawn criteria for admissibility under ER 803(a)(4). *See State v. Giles*, 196 Wn. App. 745, 757, 385 P.3d 204 (2016); *cf Tapio Inv. Co. I v. State by and through the Dep't of Transp.*, 196 Wn. App. 528, 551, 384 P.3d 600 (2016).

Determining the declarant's motive in obtaining treatment is essential to assessing admissibility. This is because "a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries [a] special guarante[e] of credibility." *See White v. Illinois*, 502 U.S. 346, 356, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *see also Bertsch v. Brewer*, 97 Wn.2d 83, 86-87, 640 P.2d 711 (1982). If nothing in the record indicates the declarant understood his statements would further his diagnosis or treatment, then the State has failed to establish the first prong of the "reasonably pertinent" test under ER 803(a)(4). *See State v. Lopez*, 95 Wn. App. 842, 850, 980 P.2d 224

(1999); accord *State v. Christopher*, 114 Wn. App. 858, 862, 60 P.3d 677 (2003); see also *State v. Carol M.D.*, 89 Wn. App. 77, 86-87, 948 P.2d 837 (1997).

To demonstrate the medical professional reasonably relied on the declarant's statements for purposes of treatment, the proponent must lay a foundation demonstrating the medical professional used the statements to assess the declarant's future care. See *Grasso*, 151 Wn.2d at 20-21; *State v. Redmond*, 150 Wn.2d 489, 496-97, 78 P.3d 1001 (2003). For example, if the declarant made statements concerning witnessing traumatic events during the alleged crime that are unrelated to the declarant's physical injuries, then the proponent must demonstrate the medical professional used this information to assess the declarant's need for counseling. *State v. Woods*, 143 Wn.2d 561, 601-02, 23 P.3d 1046 (2001), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

- c. The State failed to comply with ER 803(a)(4) because it neglected to establish Mr. Pulliam made the statements to the medical professional for the purpose of seeking treatment, and it also neglected to demonstrate the examiner relied on Mr. Pulliam's statements for the purpose of treatment.

The State failed to demonstrate Mr. Pulliam's motive was to obtain treatment, as it neglected to elicit any testimony demonstrating he underwent the examination in order to receive treatment for any injuries—

physical or psychological. Additionally, the State did not demonstrate the examiner relied on the challenged statements for the purposes of treatment. Consequently, the court erred in admitting this evidence pursuant to ER 803(a)(4).

Before the State introduced the SANE examiner's (Monica Brown) testimony, the State presented testimony from Mr. Pulliam and Mr. Pulliam's father, Curtis Craft. When Mr. Craft first heard about Mr. Pulliam's allegations, he was originally going to "kick [Mr. William's] ass," but Mr. Craft changed his mind and decided to "call the police and do it the correct way because [he] was pretty mad." 8/30/18RP 457. Mr. Craft took Mr. Pulliam to the hospital first, and Mr. Pulliam went to the hospital at his father's behest. 8/30/18RP 405-06, 441. At the hospital, Mr. Pulliam told Ms. Brown about the alleged events that transpired between him and Mr. Williams, and the staff at the hospital checked him from head to toe and swabbed him. 8/30/18RP 406. Mr. Pulliam filled out a handwritten statement to the police at the hospital. 8/30/18RP 406.

The State neither elicited testimony from Mr. Pulliam indicating he believed he needed to go to the hospital to seek medical treatment, nor did the State elicit any testimony from Mr. Craft indicating he took Mr. Pulliam to the hospital to ensure his son sought treatment for any injuries.

After this testimony and before Ms. Brown testified, the State filed a motion asking the court to admit the statements Mr. Pulliam made to Ms. Brown, and it submitted an offer of proof in support of its motion. CP 17-20. This offer of proof consisted of (1) a transcribed narrative Ms. Brown prepared summarizing Mr. Pulliam's retelling of the alleged events; and (2) citations to ER 803(a)(4) and some citations to caselaw regarding when a statement is "reasonably pertinent" for purposes of medical treatment. CP 18-19. The State asked the court to admit all of Mr. Pulliam's statements except the portion where he claimed he went to a park afterwards and cried and did not want anyone to touch him. CP 18-20. Like Mr. Pulliam's testimony, the narrative does not contain any statements from Mr. Pulliam indicating he went to the hospital to obtain treatment.

The State argued the majority of the narrative described in page two of its motion should be admitted, "assuming" it laid "the proper foundation." 9/4/18RP 6. The court noted, "the real issue before [it] is whether the information that's contained in the report or what [Ms. Brown] testifies to is necessary for the purpose of her treating the patient." 9/4/18RP 8.

With these considerations in mind, Mr. Williams objected to the admission of several of the statements described in Ms. Brown's narrative.

Mr. Williams objected to the statements indicating Mr. Williams kept providing Mr. Pulliam with drinks and Mr. Pulliam's statement that he "now [knew] why [Mr. Williams] was doing that." 9/4/18RP 12. Rather than assess whether Mr. Pulliam made that statement for purposes of treatment, the court stated it believed it was sufficient to "keep out the defendant's thoughts about what the motives are." 9/4/18RP 13. Mr. Williams then objected to the admission of Mr. Pulliam's statements where he alleged Mr. Williams called him names. 9/4/18RP 14. However, the court stated Mr. Williams' purported insults went to "the issue of force being used and the threat of force and compulsion," and it denied Mr. Williams' objection to these statements. 9/4/18RP 14.

Ms. Brown testified. The State questioned her regarding her training, and she described learning "interviewing techniques, how to use forensic collection equipment appropriately, how to package forensic evidence and store it appropriately, those types of things." 9/4/18RP 56. She later emphasized that in a SANE examination, "one of the most important things is to make sure that there's no contamination of evidence and make sure that the chain of custody for that evidence is not broken." 9/4/18RP 60. When the State asked Ms. Brown if treatment was one of her obligations, she said, "treatment is generally left to the medical personnel in whatever facility you're in." 9/4/18RP 62.

Ms. Brown recounted what she generally tells individuals before the examination. She (1) introduces herself; (2) informs individuals that they can have someone present with them; and (3) tells the individual she is using the evidence collection kit and taking swabs. 9/4/18RP 68.

Though Ms. Brown stated she speaks to medical personnel at the hospital to let them know her recommendations for follow-up assessments and care, she did not state she relayed this information to Mr. Pulliam.

9/4/18RP 68-69. She did, however, state that when Mr. Pulliam's family came back in, she let them know what Mr. Pulliam needed in terms of follow-up care in general. 9/4/18RP 69.

As soon as the State began to elicit questions concerning Mr. Pulliam's statements during the examination, Mr. Williams objected. 9/4/18RP 71. First, the State asked Ms. Brown what Mr. Pulliam said happened. 9/4/18RP 71. The court overruled this objection, and Mr. Williams asked for a standing objection "for the purpose of what [he] expect[ed] to be some additional follow up questions." 9/4/18RP 71. The court refused, said it could not grant a standing objection, and instructed Mr. Williams "to object when [he] feel[s] that's appropriate." 9/4/18RP 70-71.

Given the court's ruling, Mr. Williams launched several objections during Ms. Brown's testimony. Mr. Williams objected when Ms. Brown

recounted Mr. Pulliam's statements concerning (1) what happened on the evening of the alleged rape; (2) who gave Mr. Pulliam drinks; (3) the names Mr. Williams allegedly called Mr. Pulliam and the commands he made during the alleged rape; (4) where the alleged rape occurred; (5) where Mr. Williams allegedly put oil on Mr. Pulliam's body; (6) where Mr. Pulliam went after the alleged rape; and (7) what Mr. Pulliam did at the park after the alleged rape. 9/4/18RP 73-74, 81-83, 87. The court overruled all of these objections.

Consequently, the jury heard the following statements Mr. Pulliam stated to Ms. Brown: (1) he spent the evening hanging out with Mr. Williams, and they went to a bar and had some drinks; (2) Mr. Williams "kept bringing [drinks] to [Mr. Pulliam], and [he] just kept drinking them;" (3) Mr. Williams "kept calling [him] names like little bitch and [told him] to bend over and that [he] was going to take this dick" during the alleged rape; (4) the worst part of the purported rape was when Mr. Williams started to penetrate, and Mr. Pulliam started "crying and screaming, begging for him to stop;" (5) Mr. Williams drug Mr. Pulliam on the ground by his leg and the "attack" occurred on the ground; (6) Mr. Williams poured oil all over Mr. Pulliam's body; and (7) Mr. Pulliam went to a park after the alleged rape where he cried and met up with his ex-

girlfriend, who took him to a hotel for the night. 9/4/18RP 73-74, 81-83, 87.

The court's admission of these statements was in error for two material reasons. First, the State failed to demonstrate Mr. Pulliam understood Ms. Brown would use his statements to promote his treatment. Mr. Pulliam did not appear to go to the hospital because he personally believed he needed treatment. Instead, it appears he only went to the hospital at the suggestion of his father, and he went to the hospital close to 24 hours after the alleged rape. The gap in time between Mr. Pulliam's visit to the hospital coupled with the fact that he went to the hospital only on his father's suggestion strongly suggests Mr. Pulliam did not believe he had any injuries that warranted medical treatment.

Moreover, nothing in Ms. Brown's testimony indicates she told Mr. Pulliam her examination would be done in part to create a treatment plan. Instead, Ms. Brown merely told Mr. Pulliam she would be collecting evidence and taking swabs. It was not until *after* she completed her examination and Mr. Pulliam's family returned to the room that Ms. Brown relayed possible follow-up care.

Second, the State failed to establish Ms. Brown reasonably relied on Mr. Pulliam's statements for the purposes of treatment. Ms. Brown emphasized her training as a SANE examiner focused on collecting

evidence and interviewing the examinee. She testified that “treatment is generally left to the medical personnel.” 9/4/18RP 62. And nowhere in her testimony did she describe providing her examinees with follow-up recommendations for mental health treatment. Thus, while Ms. Brown agreed the narrative of events from Mr. Pulliam was “kind of” important to guide her assessment, Ms. Brown never specified *why* it was important to learn (1) the identity of the person who was providing Mr. Pulliam with drinks; (2) the names and purported insults and commands Mr. Williams directed at Mr. Pulliam during the alleged rape; (3) what the worst part of the alleged rape was and where in the apartment it happened; (4) where Mr. Williams purportedly poured oil on Mr. Pulliam; and (5) where Mr. Pulliam went after the alleged incident. 9/4/18RP 69-70.

This lack of foundation is critical because it is difficult to understand why any of these statements were important to treatment. For example, while learning Mr. Pulliam drank the night of the alleged incident could conceivably be pertinent to treating any physical injuries, knowing *who* provided him with drinks is not. Similarly, the names, insults, and commands Mr. Williams purportedly directed at Mr. Pulliam has no bearing on treating any potential physical injuries. This information could potentially be relevant to treatment if Ms. Brown assisted in providing psychological or psychiatric treatment, but the record fails to

establish Ms. Brown assisted in providing this sort of treatment. Likewise, learning Mr. Williams cried after the alleged incident may be pertinent to obtaining psychological or psychiatric treatment, but it is not pertinent to treating any physical injuries. *Compare Woods*, 143 Wn.2d at 601-02 (affirming admission of hearsay statements under ER 803(a)(4) unrelated to physical injuries because the State established the medical professional used the statements to assess the declarant's need for counseling). Ms. Brown did not claim she provided Mr. Pulliam with referrals for any such psychological counseling.

Because the record is bereft of explanations as to how any of these statements were pertinent to Ms. Brown's examination, the State failed to establish these statements were admissible under ER 803(a)(4).

d. These improperly admitted statements prejudiced Mr. Williams, and so this Court should reverse.

Evidentiary errors require reversal if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected” absent the evidence. *In the Matter of the Detention of Post*, 170 Wn.2d 302, 314, 241 P.3d 1234 (2010); *accord State v. Gower*, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). This requires this Court to assess whether a reasonable probability exists that the jury

would have reached a different outcome. *State v. Gunderson*, 181 Wn.2d 916, 927, 337 P.3d 1090 (2014).

A reasonable probability exists that the erroneous admission of this hearsay evidence materially affected the outcome of Mr. Williams' trial. First, it is important to highlight that the State's evidence indicating Mr. Williams raped Mr. Pulliam was largely based on Mr. Pulliam's testimony, as tenuous physical evidence supported his allegations. While Mr. Pulliam claimed he was forcibly anally raped several times, he did not have lacerations or significant injuries on his anus. 8/3018RP 380-81; 9/4/18RP 88, 124-25. Instead, he merely had "general swelling" 9/4/18RP 106. Mr. Pulliam did not shower after the alleged rape, and he stated Mr. Williams did not wear a condom, and yet Mr. Williams' DNA was only present on Mr. Pulliam's neck. 9/4/18RP 86, 115, 131, 168.

Despite Mr. Pulliam's claim that Mr. Williams licked him all over his body, Mr. Williams' DNA was absent from Mr. Pulliam's buttocks, anus, penis, and perineal-scrotal area. 9/4/18RP 75, 158-59, 165, 167. However, a forensic scientist found another unknown male's semen mixed with Mr. Pulliam's in his perineal-scrotal area, and the investigator found another person's saliva on Mr. Pulliam's buttocks. 9/4/18RP 159-60, 167. An unknown individual's saliva was present on Mr. Pulliam's neck. 9/4/18RP 168-69. Moreover, though Mr. Pulliam claimed Mr.

Williams “dragged” him all over the floor, there were no marks, abrasions, or contusions on Mr. Pulliam’s shoulders, elbows, or on the palms of his hand on the date following the alleged incident. 8/30/18RP 380; 9/4/18RP 122.

Given this contradictory and equivocal physical evidence, Mr. Pulliam’s credibility was key to the jury’s determination of Mr. Williams’ guilt or innocence, and this hearsay evidence both bolstered Mr. Pulliam’s credibility and inflamed the jury against Mr. Williams. The retelling corroborated Mr. Pulliam’s earlier testimony regarding the alleged rape. Additionally, the hearsay evidence reiterated highly prejudicial evidence. It consisted of inflammatory threats and insults Mr. Williams directed at Mr. Pulliam, (e.g., calling him a “little bitch” and telling him to “bend over” and “take [his] dick”), and it also consisted of statements indicating Mr. Williams was being predatory from the very beginning of the evening of the alleged rape (e.g., statements that Mr. Williams provided Mr. Pulliam with all of the drinks). These hearsay statements also consisted of highly emotional testimony, which undoubtedly tugged at the jury’s heartstrings (e.g., Mr. Pulliam reporting that he cried after the purported rape).

“Where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new

trial is necessary.” *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010) (internal quotations omitted). This is such a case. This Court should reverse.

2. The court impermissibly commented on the evidence and violated the presumption of innocence when it referred to Mr. Pulliam by his initials in the to-convict instructions.

- a. The Washington Constitution prohibits judges from commenting on the evidence.

Article IV, section 16 provides, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” “[T]he purpose of Art. 4, § 16 of the Washington constitution, ‘is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the evidence submitted.’” *State v. Lampshire*, 74 Wn.2d 888, 892, 447 P.2d 727 (1968) (quoting *Heitfeld v. Benevolent Protective Order of Keglars*, 36 Wn.2d 685, 699, 220 P.2d 655 (1950)). Unconstitutional comments on the evidence include instructions to the jury on factual matters and comments that convey to the jury the court’s personal opinion on the evidence. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). “[I]f the trial judge conveys to the jury his personal opinion regarding the truth or falsity of any evidence introduced at the trial he has violated the constitutional mandate.” *State v. Bogner*, 62 Wn.2d 247, 250, 382 P.2d 254 (1963).

- b. The court impermissibly conveyed to the jury it found Mr. Pulliam credible and believed Mr. Williams raped him when it concealed Mr. Pulliam's identity in the jury instructions and used only his initials.

After both parties, all the witnesses, and the court referred to Mr. Pulliam by either his first or last name during the entire trial, the court suddenly referred to Mr. Pulliam by his initials in the to-convict instruction. Specifically, the court redacted Mr. Pulliam's name and substituted his initials in the to-convict instruction. CP 34.

The court's comment in referring to Mr. Pulliam by his initials in the jury instructions conveyed to the jury the court's opinion that Mr. Pulliam was, in fact, a rape victim. The impact of this was particularly significant when all parties and the court referred to Mr. Pulliam by his first or last name throughout the trial. It was only *after* hearing all of the evidence that the court changed the way it referred to Mr. Pulliam. The court's comments amounted to an impermissible comment on the evidence in violation of article IV, section 16.

The pattern to-convict instructions direct the court to insert the "name of person" and "name of child" in the instructions. 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 41.02, 44.15 (4th Ed. 2016) (WPIC). But the court modified these and, instead of using

Mr. Pulliam's name, the court used his initials. CP 86, 89, 91-92. This conveyed to the jury the court considered him a victim.

Several federal courts have found the use of pseudonyms in civil sexual assault trials constitute a judicial comment on the evidence that prejudices the defendant. In *Doe v. Cabrera*, the victim of a sexual assault was permitted to proceed anonymously pretrial. 307 F.R.D. 1 (D.D.C. 2014). However, the court refused to extend the use of pseudonyms to the trial phase, reasoning:

the defendant's ability to receive a fair trial will likely be compromised if the Court allows the plaintiff to continue using a pseudonym, *as the jurors may construe the Court's permission for the plaintiff to conceal her true identity as a subliminal comment on the harm the alleged encounter with the defendant has caused the plaintiff.*

Id. at 10 (emphasis added); *see also Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000).

It is not difficult to appreciate that jurors may infer that the Court has an opinion about the harm the plaintiff has allegedly suffered by its decision to permit the plaintiff to conceal her true identity. The Court cannot afford the plaintiff that potential advantage at the expense of the defendant, who like the plaintiff is also entitled to a fair trial.

Cabrera, 307 F.R.D. at 10, n.15.

Similarly, in *Doe v. Rose*, a California district court allowed a plaintiff in a sexual assault case to move forward anonymously pretrial,

but precluded use of a pseudonym at trial, noting that several courts have concluded the practice may be interpreted as a comment on the evidence. CV-15-07503-MWF-JCx, 2016 WL 9150620 at *3 (C.D. Cal. 2016).¹ The court found the use of a pseudonym “is perhaps more accurately characterized as an overt suggestion” the alleged harm occurred, and the prejudice could not be overcome even by a limiting instruction. *Id.*

- c. The court’s use of Mr. Pulliam’s initials in the jury instructions undermined Mr. Williams’ presumption of innocence in violation of his right to due process.

The use of Mr. Pulliam’s initials in the to-convict instructions also undermined the presumption of innocence by preemptively telling the jury the court was protecting Mr. Pulliam because Mr. Williams raped him. This deprived Mr. Williams of his constitutional right to due process and to a fair and impartial jury. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. “The presumption of innocence is the bedrock upon which the criminal justice system stands.” *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). Accordingly, jury instructions must convey the State’s burden to prove every element beyond a reasonable doubt. *Id.* at 307 (citing *Victor v. Nebraska*, 511 U.S. 1, 5-6, 114 S. Ct. 1239, 127 L. Ed. 2d

¹ Cited pursuant to GR 14.1 (permitting citation to unpublished cases from other jurisdictions as authority if citation is permitted in the jurisdiction of the issuing court) and FRAP 32.1 (permitting citation to unpublished federal judicial opinions issued after January 1, 2007).

583 (1994)). This Court must reverse where a court instructs a jury in a manner that relieves the State of this high burden of proof as to any element. *See id.*; *see also Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

The jury instructions concealed Mr. Pulliam's identity, effectively telling the jury he was in fact a rape victim who needed protection. This shifted the burden onto Mr. Williams to prove Mr. Pulliam was not his victim. This prohibited shifting of the burden onto the accused requires reversal and remand for a new trial.

d. Prejudice is presumed from these impermissible comments and reversal is required.

This Court presumes prejudice from judicial comments on the evidence. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). This Court must reverse the conviction and remand for a new trial unless the State affirmatively proves that "the jury could not have been influenced by the comments of the trial judge." *Bogner*, 62 Wn.2d at 256.

Here, the State cannot prove the jury could not have been influenced by the court's impermissible comments. As discussed fully in the first portion of the argument section of this brief, this case presented a credibility determination for the jury. The court's use of Mr. Pulliam's initials *only* after hearing all of the evidence communicated to the jury the

court's belief Mr. Williams raped Mr. Pulliam, requiring it to protect his identity. This comment undoubtedly tipped the scales in favor of the State.

Describing a witness as a victim in the to-convict instruction is particularly harmful because the to-convict instruction carries a special weight and is the “yardstick” by which the jury measures a defendant's guilt or innocence. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Because it is so central to the jury's determination, additional instructions cannot adequately supplement a defective to convict instruction. *State v. Johnson*, 180 Wn.2d 295, 306, 325 P.3d 135 (2014).

Treating Mr. Pulliam as a victim served to bolster his credibility regarding the disputed allegation.. *See State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006) (inclusion of victim's dates of birth in instruction “conveyed the impression that those dates had been proved to be true” and was impermissible comment on evidence); *State v. Eaker*, 113 Wn. App. 111, 120, 53 P.3d 37 (2002) (comment bolstering witness credibility particularly harmful where credibility central to case).

The court's statements were an improper comment on the evidence in violation of Mr. Williams' constitutional rights. Courts presume these unconstitutional comments prejudiced Mr. Pulliam. This Court should reverse and remand for retrial.

3. The redaction of Mr. Pulliam’s name in court documents without an *Ishikawa* analysis violated Mr. Williams’ right to a public trial.

The court referred to Mr. Pulliam by his initials in the to-convict instruction, which was filed as a court document. CP 34. The State also referred to Mr. Pulliam by his initials in its motions, in the information, and in the probable cause statement. CP 1-3, 17-20.

The Washington Constitution requires “[j]ustice in all cases shall be administered openly.” Const. art. I, § 10. Transparency is critical in fostering understanding and trust in the judicial system and ensuring a fair trial. *State v. Duckett*, 141 Wn. App. 797, 803, 173 P.3d 948 (2007). “The open administration of justice is a vital constitutional safeguard,” necessary to protect the integrity of the courts. *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 7, 330 P.3d 168 (2014). The court must ensure compliance with this constitutional mandate. *Id.* at 9 (courts “must fulfill our independent obligation to protect the open administration of justice.”). A violation of article I, section 10 is a manifest constitutional error that a defendant may raise for the first time on appeal. RAP 2.5(a)(3); *In re Detention of Ticeson*, 159 Wn. App. 374, 382-83, 246 P.3d 550 (2011).

Court records, like courtrooms, must be open, absent justified closure demonstrated on the record. *See Hundtofte*, 181 Wn.2d at 7. Courts must complete an on-the-record analysis using the five-step

framework² outlined in *Seattle Times Co. v. Ishikawa* prior to the redaction of any court records. 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982); *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (adopting same analysis for courtroom closures in criminal cases); *State v. Waldon*, 148 Wn. App. 952, 967, 202 P.3d 325 (2009) (adopting same analysis to sealing of court documents in criminal cases). The “presumption of openness can be overcome only if the *Ishikawa* factors weigh in favor of sealing.” *State v. Chen*, 178 Wn.2d 350, 355, 309 P.3d 410 (2013). Failure to weigh the right to a public trial is a constitutional violation. *Waldon*, 148 Wn. App. at 967.

The names of litigants or alleged victims in court documents are encompassed by article I, section 10 and subject to an *Ishikawa* analysis. The Washington Supreme Court has already determined that it is unconstitutional for courts to preclude disclosure of the identity of child

² The five factors are:

1. The proponent of closure or sealing must show the need for doing so, stating as specifically as possible the rights or interests at stake and where that need is based on a right other than an accused’s right to a fair trial, the proponent must show a “serious and imminent threat” to those rights of interests.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

victims of sexual assault absent an *Ishikawa* analysis. *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993). *Eikenberry* struck down a statute that prohibited disclosure of names and other identifying information of child victims of sexual assault, as it compelled a court to close proceedings and seal court records upon only a showing that such closure was necessary to prevent disclosure of the identifying information. 121 Wn.2d at 208-09. Noting that there may be compelling reasons to protect child victims “on an individualized basis,” the *Eikenberry* court nevertheless concluded that any closure which does not comply with the *Ishikawa* guidelines is prohibited by article I, section 10. *Id.* at 211.

In Mr. Williams’ case, his constitutional public trial right was violated in the documents where the trial court failed to conduct an on-the-record *Ishikawa* analysis. The State made no motion to redact the records, and no basis exists to support such a motion.

The public trial violation in Mr. Williams’ case occurred from the inception of his case through sentencing. CP 1-3. Concealing Mr. Pulliam’s identity in court documents and the to-convict instructions, rendered Mr. Williams’ trial “fundamentally unfair.” *See State v. Momah*, 167 Wn.2d 140, 149, 217 P.3d 321 (2009) (*quoting Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466

(2006)). The closure took place through every aspect of his case, requiring reversal. *State v. Wise*, 176 Wn.2d 1, 16-17, 288 P.3d 1113 (2012).

4. The court erred in denying Mr. Williams’ motion for a new trial based on ineffective assistance of counsel, as his trial counsel performed deficiently when he neglected to secure the testimony of several key witnesses.

- a. A court must grant the defendant a new trial if his counsel performed deficiently and to the detriment of the defendant.

Under CrR 7.5, a court should grant a defendant a new trial if he affirmatively demonstrates that something at trial materially affected his substantial rights. CrR 7.5 delineates eight different grounds that support a motion for a new trial, including the ground that provides for a new trial if “substantial justice has not been done.” Under this ground, a defendant can move for a new trial based on ineffective assistance of counsel. *State v. Dawkins*, 71 Wn. App. 902, 906-07, 863 P.2d 124 (1993). CrR 7.5 provides that when the defendant presents a motion “based on matters outside the record,” the defendant must set forth the facts via an affidavit.

Trial judges have broad discretion in granting motions for a new trial. *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981). This Court will reverse a court’s denial of a motion for a new trial if the court abused its discretion when it denied the defendant’s motion. *State v. Pete*, 152 Wn.2d 546, 98 P.3d 803 (2004). A court abuses its discretion when its

bases its decision on untenable grounds or untenable reasons, if it rests on facts the record does not support, or if the court applied the wrong legal standard. *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 423-24, 138 P.3d 1053 (2006). A court also necessarily abuses its discretion when it impermissibly infringes on a person's constitutional rights. *Cf State v. Valencia*, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010).

- b. An attorney performs deficiently when he fails to investigate and call witnesses the defendant identified as material to his defense.

The Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee the accused the right to the effective assistance of counsel. U.S. CONST. amend. VI; Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 685-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. A.N.J.*, 168 Wn.2d 91, 97, 225 P.3d 956 (2010). Without the right to the effective assistance of counsel, “the right to a fair trial would be of little consequence, for it is through counsel that the accused secures his other rights.” *Kimmelman v. Morrison*, 477 U.S. 365, 377, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (internal citations omitted). Accordingly, when counsel is ineffective, his ineffective performance also deprives the accused of his right to a fair trial. *Strickland*, 466 U.S. at 684-85.

In assessing whether reversal is required, this Court must first determine whether his counsel performed deficiently. *Hinton v. Alabama*, 571 U.S. 263, 272, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014). This requires an assessment of whether counsel’s representation “fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. This inquiry focuses on the reasonableness of the attorney’s performance given all of the circumstances. *Id.* A single, serious error can support a claim of ineffective assistance. *Kimmelman*, 477 U.S. at 383.

While courts presume that attorneys perform competently, the defendant can overcome this presumption if he demonstrates counsel’s representation was “unreasonable under prevailing professional norms and the challenged action was not sound strategy.” *Kimmelman*, 477 U.S. at 381. Moreover, even if counsel’s challenged decision was strategic, “that does not render it immune to attack—it must be a reasonable strategy.” *Jones v. Wood*, 114 F.3d 1002, 1010 (9th Cir. 1997). Counsel’s failure to interview and call a particular witness to testify at a defendant’s trial can constitute deficient performance. *State v. Jones*, 183 Wn.2d 327, 330, 352 P.3d 776 (2015); *see also State v. Byrd*, 30 Wn. App. 794, 799-800, 638 P.2d 601 (1981); *State v. Jury*, 19 Wn. App. 256, 264, 576 P.2d 1302 (1978).

Mr. Williams' counsel performed deficiently when he neglected to call material witnesses, which in part was a consequence of his failure to meet regularly with Mr. Williams. After the verdict but before sentencing, Mr. Williams moved for new counsel. 10/5/18RP 630-31. The court granted the motion, and Robert Quillian was appointed as counsel. 10/5/18RP 631-32; 3/15/19RP 635. Mr. Williams filed a motion for a new trial. CP 44. In support of this motion, Mr. Williams submitted an affidavit. CP 45-47. The affidavit notes Mr. Williams met with trial counsel, Travis Currie, only prior to court appearances and only for a short and rushed time period. CP 45. Other than those brief meetings, Mr. Currie only met with Mr. Williams twice: once shortly after his arrest and the second time when trial was already underway. CP 45. Mr. Williams provided Mr. Currie with a list of individuals he needed to contact and call as witnesses; however, it appeared Mr. Currie never contacted these individuals, and they were never called as witnesses at Mr. Williams' trial. CP 45.

Among the listed witnesses was James Bloom. CP 46. Mr. Williams averred Mr. Bloom would testify that he gave Mr. Williams a ride and helped him carry some items into his apartment at around 7:30 p.m. on the evening of the alleged rape. CP 46. Mr. Williams asserted Mr. Bloom would testify that Mr. Pulliam came to the apartment shortly

afterwards, and he was high on some drug. CP 46. Mr. Pulliam offered Mr. Bloom drugs, but he declined. CP 46.

As Mr. Williams acknowledged, the most critical witness on this list was Jesse Ramirez, a man who was intermittently staying at Mr. Williams' apartment. CP 46. Mr. Williams asserted Mr. Ramirez would testify he let himself into the apartment around midnight on the date of the purported rape and saw a fight between Mr. Williams and Mr. Pulliam. CP 46-47. Mr. Ramirez witnessed Mr. Williams appear extremely angry, and he witnessed Mr. Pulliam aggressively strike Mr. Williams and call him names. CP 47. After this happened, Mr. Williams armed himself and told Mr. Pulliam to leave his apartment. CP 47. At no point did Mr. Ramirez hear Mr. Pulliam accuse Mr. Williams of sexually assaulting him, and at no point did Mr. Ramirez see any sort of evidence indicating Mr. Williams sexually assaulted Mr. Pulliam. CP 47. Mr. Ramirez intervened and also told Mr. Pulliam to leave. CP 47.

Mr. Williams also asserted Mr. Ramirez would testify that he spent the night and heard a phone conversation between Mr. Williams and Ms. Turner. CP 47. During the conversation, Mr. Williams emphatically said Mr. Pulliam was the one who assaulted him, and he told her to go ahead and call law enforcement. CP 47. Mr. Williams provided her with his address to pass on to the police. CP 47.

Counsel was deficient in neglecting to both contact Mr. Ramirez and Mr. Bloom and in failing to call Mr. Ramirez and Mr. Bloom as witnesses. There is no reasonably legitimate tactical reason for counsel to forego contacting witnesses that can undermine the State's evidence. And no conceivably reasonable tactical reason exists for counsel to neglect to introduce the testimony of a witness who can undermine the State's key witness. *See Byrd*, 30 Wn. App. at 798-800 (where defendant was convicted of rape and kidnapping, finding counsel performed deficiently where he neglected to call a witness who testified the alleged victim entered the defendant's apartment in a "jovial mood.") Accordingly, counsel performed deficiently.

- c. Counsel's failure to present the testimony of the material witnesses Mr. Williams identified to counsel prejudiced Mr. Williams.

After a defendant establishes that his counsel performed deficiently, this Court must next assess whether counsel's deficient performance prejudiced him. This Court determines whether counsel's deficient performance prejudiced the defendant by examining whether a reasonable probability exists that, but for counsel's errors, the factfinder would have a reasonable doubt as to the defendant's guilt. *Hinton*, 571 U.S. at 275.

A reasonable probability exists that counsel's deficient performance prejudiced Mr. Williams because both of these witnesses would have undermined the State's case. As discussed, Mr. Pulliam's credibility (or lack thereof) was central to this case, as the physical evidence behind his allegations was equivocal at best and underwhelming at worst.

This eyewitness testimony would have certainly undermined Mr. Pulliam's credibility. First, it would have undermined Mr. Pulliam's perception of the night, as Mr. Bloom would have testified that Mr. Pulliam was under the influence of some drug. Second, and most importantly, Mr. Ramirez's testimony would have created a reasonable doubt as to Mr. Pulliam's retelling of the evening. It would paint a significantly different story than the story Mr. Pulliam told to the jury. Rather than Mr. Williams raping Mr. Pulliam, Mr. Williams instead threw Mr. Pulliam out of his apartment after Mr. Pulliam assaulted him. This could have demonstrated that Mr. Pulliam had an ulterior motive to accuse Mr. Williams of this crime.

- d. The court's reasons for denying Mr. Williams' motions for a new trial were untenable, and so this Court should reverse.

After Mr. Williams submitted the motion for a new trial, the court (1) issued an order that allowed Mr. Williams' prior counsel to divulge communications regarding defense witnesses and his strategic decisions; and (2) expanded the time to allow Mr. Williams to find the witnesses he identified in his motion. CP 53; 3/15/19RP 644. Mr. Williams hired an investigator to locate Mr. Ramirez, as Mr. Williams recognized his testimony "would have carried the most weight." 5/24/19RP 652. However, by the time that Mr. Williams returned before the court (nearly six weeks later), the investigator could not locate Mr. Ramirez. 5/24/19RP 652. Additionally, Mr. Quillian spoke to Mr. Currie, but Mr. Quillian's discussions with Mr. Currie "led to no useful information to supplement [the] previous motion." 5/24/19RP 652. Consequently, Mr. Williams rested on his prior affidavit in asking the court to grant the motion for a new trial. 5/24/19RP 653.

In denying Mr. Williams' motion for a new trial, the court opined it could not grant the motion because (1) it could not evaluate the credibility of the proposed testimony based on Mr. Williams' declaration because it was hearsay; (2) it could not find counsel's performance

prejudiced Mr. Williams because Mr. Ramirez was not an eyewitness to the period of time in the evening where Mr. Pulliam alleged he was raped; and (3) it did not believe Mr. Ramirez's testimony rendered the verdict unreliable. CP 74; 5/24/19RP 656.

The court was wrong in concluding it could not evaluate the credibility of Mr. Williams' testimony "because it was hearsay" for two reasons. First, CrR 7.5 explicitly states that when the defendant presents a motion "based on matters outside the record," the defendant must set forth the facts via an affidavit. Thus, CrR 7.5 contemplates a court's consideration of evidence based on affidavits, which may invariably contain hearsay statements. *See State v. Berhe*, 193 Wn.2d 647, 444 P.3d 1172 (2019) (Supreme Court concluding court erred in denying defendant's motion for an evidentiary hearing in support of a new trial where defendant submitted an affidavit containing hearsay evidence).

Second, Mr. Williams' affidavit was not largely based on hearsay; rather, it was based his personal assertions of what he expected his witnesses would testify to. CP 44-47. The court was therefore mistaken in believing it was forbidden from assessing credibility merely because Mr. Williams did not produce live witnesses. This constitutes an abuse of discretion. *T.S.*, 157 Wn.2d at 423-24.

Additionally, for the reasons fully expressed above, the court erred in concluding counsel's deficient performance did not prejudice Mr. Williams and did not render the verdict unreliable. Simply because Mr. Ramirez was not present during Mr. Pulliam's purported time frame of the alleged rape does not mean Mr. Ramirez's testimony would not have undermined Mr. Pulliam's credibility. The testimony Mr. Williams sought to secure still undermined Mr. Pulliam's retelling of the events, which was critical in this case. The court's reasoning to the contrary was untenable.

This Court should reverse.

5. Because Mr. Williams is indigent, this Court should remand so that the sentencing court may strike its imposition of discretionary LFOs and strike the provision of its order requiring Mr. Williams to pay interest on his non-restitution LFOs.

In 2018, the law on legal financial obligations changed. Now, it is categorically impermissible to impose any discretionary costs on indigent defendants. LAWS OF 2018, ch. 269, § 6(3). While all LFOs used to bear interest, the legislature eliminated interest accrual for non-restitution LFOs. LAWS OF 2018, ch. 269, § 1. And now the only mandatory legal financial obligation that individuals must pay (even if they are indigent) is the victim penalty assessment, which is \$500. RCW 7.68.035(1)(a). Our Supreme Court held these changes apply prospectively to cases on direct appeal. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

Mr. Williams is indigent. CP 77-79. However, the court ordered Mr. Williams to pay \$200 in discretionary LFOs, and it also ordered that his LFOs bear interest. CP 60-61. Accordingly, this Court should direct the sentencing court to strike the \$200 in discretionary LFOs and to strike the portion of the judgment and sentence imposing interest on Mr. Williams' LFOs. *Ramirez*, 191 Wn.2d at 750; *see* CP 60-61.

E. CONCLUSION

Based on the foregoing, Mr. Williams respectfully requests that this Court reverse his conviction. Alternatively, Mr. Williams asks this Court to remand so that the sentencing court may strike all discretionary LFOs and the portion of the judgment and sentencing ordering Mr. Williams to pay interest on his LFOs.

DATED this 13th day of March, 2020.

Respectfully submitted,

/s Sara S. Taboada
Sara S. Taboada – WSBA #51225
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 53518-1-II
v.)	
)	
MICHAEL WILLIAMS,)	
)	
Appellant.)	

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