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Court of Appeals
Division III
State of Washington

NO. 34800-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT GOODSON,

Appellant.

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

The Honorable Scott D. Gallina, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in ruling Mr. Goodson "opened the door" on cross-examination to admission of Nora Goodson's written statement.

2. The state committed misconduct in presenting irrelevant and prejudicial evidence about the lethality of strangulation.

3. The state committed misconduct in presenting irrelevant and prejudicial evidence as to why strangulation is a felony.

4. The state committed misconduct in presenting testimony as to what people really mean when they say they were choked.

5. The state made an improper emotional plea in closing argument when telling the jury they were fortunate not to be trying a homicide.

6. The state made an improper emotional plea in closing argument when telling the jury Mr. Goodson had Nora Goodson's life in his hands.

7. The state committed misconduct by telling the jury in closing argument they had to tell him their reasons for doubting Mr. Goodson's guilt.

8. Cumulative instances of prosecutorial misconduct denied Mr. Goodson a fair trial.

9. Defense counsel's failure to object to the state's admission of irrelevant evidence about the lethality of strangulation denied Mr. Goodson effective assistance of counsel.

10. Defense counsel's failure to object to the state's evidence as to why strangulation is a felony denied Mr. Goodson effective assistance of counsel.

11. Defense counsel's failure to object to the state's soliciting from its witness what people mean when they say "choke" rather than "strangle" denied Mr. Goodson effective assistance of counsel.

12. Defense counsel's failure to object to the state's emotional appeal to the jury in closing argument that they were fortunate to be trying an assault rather than a homicide denied Mr. Goodson effect assistance of counsel.

13. Defense counsel's failure to object to the state's emotional appeal to the jury in closing argument that Mr. Goodson had Nora Goodson's life in his hands denied Mr. Goodson effective assistance of counsel.

14. Defense counsel's failure to object to the state telling the jury they had to tell him what reasons they had to doubt the evidence denied Mr. Goodson effective assistance of counsel.

15. Defense counsel's likely violation of the Rules of Professional Conduct in turning away from the courthouse Nora Goodson, for whom a material witness warrant had been issued, denied Mr. Goodson effective assistance of counsel.

16. Defense counsel's likely commission of the crime of tampering with a witness in imploring Nora Goodson, a person with a material witness warrant, to leave the courthouse rather than make her presence known, denied Mr. Goodson effective assistance of counsel.

17. Defense counsel's failure to object to Officer Rigney's irrelevant hearsay as to the basis for his being dispatched to see Nora Goodson denied Mr. Goodson effective assistance of counsel.

18. Defense counsel's failure to object to testimony from Detective Nichols about what Office Rigney told her as to the basis for the dispatch to see Nora Goodson denied Mr. Goodson effective assistance of counsel.

19. Defense counsel's failure to make a correct objection to the introduction of Nora Godson's written statement denied Mr. Goodson effective assistance of counsel.

20. Defense counsel's failure to object to Detective Nichols repeatedly characterizing Nora Goodson as a "victim" denied Mr. Goodson effective assistance of counsel.

21. Defense counsel's failure to object to Detective Nichols' and Officer Rigney's testimony that Nora Goodson's injuries were consistent with strangulation denied Mr. Goodson effective assistance of counsel.

22. Defense counsel's failure to object to Detective Nichols' testimony and the state's arguments that what Nora Goodson really meant by choking was actually strangulation denied Mr. Goodson effective assistance of counsel.

23. Defense counsel's failure to object to Detective Nichols' irrelevant testimony that she thought Mr. Goodson's demeanor toward Nora Goodson during certain phone conversations was demeaning denied Mr. Goodson effective assistance of counsel.

24. Cumulative errors caused by defense counsel's ineffectiveness denied Mr. Goodson effective assistance of counsel.

25. The trial court exceeded its statutory authority when it imposed discretionary legal financial obligations without making an individualized inquiry into Mr. Goodson's current and future ability to pay.

26. The judgment and sentence contains scrivener's errors on the date of the jury's verdict.

27. If the state substantially prevails on appeal, any request for appellate costs should be denied.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1. Whether the trial court committed reversible error in holding Mr. Goodson opened the door to the admission of Nora Goodson's written statement in violation of Mr. Goodson's right to confrontation?

Issue 2. Whether numerous instances of prosecutorial misconduct in presenting evidence and in argument, considered individually or collectively, denied Mr. Goodson a fair trial?

Issue 3. Whether numerous instances of ineffective assistance of counsel, considered individually or cumulatively, denied Mr. Goodson effective assistance of counsel?

Issue 4. Whether the trial court exceeded its statutory authority under RCW 10.01.160(3) when it imposed discretionary legal financial

obligations (LFOs) without first considering Mr. Goodson's current and future ability to pay them and whether defense counsel was ineffective in failing to object to the imposition of discretionary LFOs?

Issue 5. Whether Mr. Goodson's entitlement to a judgment and sentence free of scrivener's errors requires his case be remanded to correct the incorrect verdict date?

Issue 6. Whether, if Mr. Goodson is unsuccessful in this appeal, this Court should refuse to impose appellate costs if the state requests costs?

C. STATEMENT OF THE CASE

Procedural Facts

By a second amended information, Robert Goodson faced charges of assault in the second degree (strangulation)[1] and 13 counts of violating a domestic violence no contact order. CP 25-38. A jury found him guilty of all charges and found the offenses were domestic violence.[2] CP 39-42. The named victim of the assault was Mr. Goodson's wife, Nora Goodson. CP 25.

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[1] RCW 9A.36.021(1)(g)

[2] There are 3 volumes of verbatim report of proceedings designated as RP A, RP B, and RP C as per the transcriptionist's notation on each volume.

While in jail pending trial, Mr. Goodson called and spoke to Nora Goodson multiple times about various life details in violation of the order prohibiting Mr. Goodson from contacting Mrs. Goodson. RP A 10, 51.

Before trial, the state requested and received a material witness warrant for Nora after efforts to locate her for service failed. RP A 26; CP 24. The warrant remained in effect until after the jury returned its verdict. RP B 355-56. Nora Goodson did not testify. Defense counsel noted during trial that Nora Goodson was crucial to its defense of the charges. RP B 280.

Prior to sentencing, Mr. Goodson discovered a trial irregularity. RP C 425. Nora Goodson had come to the courthouse when she learned the trial was in progress. CP 43-50. She wanted to tell her side of the story and hoped to help her husband. Id. Defense counsel, Mr. Laws, saw Nora Goodson at the courthouse. Id. In knowing disregard of the material witness warrant, Mr. Laws implored Nora Goodson to leave. Id. And she did. Id. Mr. Laws did not tell the state of Nora Goodson's presence at the courthouse. Id. When the jury returned its verdict, Nora Goodson's material witness warrant was quashed. Id.

Attorney Bottomley filed post-trial pleadings on Mr. Goodson's behalf. CP 43-47. The court held a hearing at which Nora Goodson

positively identified Mr. Laws as the person who implored her to leave the courthouse. RP C 442. Mr. Laws did not testify at the hearing. RP C 442-49.

The trial court denied Mr. Bottomley's post-trial motion cast in terms of trial irregularity and ineffective assistance of counsel. CP 43-47; RP C 441-49. The court found Mr. Laws imploring Nora Goodson to leave the courthouse was a reasonable trial tactic available to the discretion of defense counsel Laws and found no legal error in his action. CP 57-59. The court did not condone Mr. Laws' behavior. The court entered written findings and conclusions to support its ruling. CP 57-59.

Mr. Bottomley represented Mr. Goodson at sentencing. RP C 460-467. The court imposed a 27-month exceptional sentence downward. RP C 466; CP 71-81. The court imposed discretionary legal financial obligations without first determining Mr. Goodson's present or future ability to pay them. RP C 460-67; CP 75.

Although the jury returned its verdict on July 8, 2016, CP 39-42, the judgment and sentence lists the verdict date as July 9, 2016. CP 71.

Goodson appeals all portions of his judgment and sentence. CP 82-93.

Trial Evidence

Mr. Goodson and Nora Goodson are the only two people with personal knowledge of what happened between them before Nora called their daughter Jessica Ongstead. Jessica testified Nora Goodson was very upset and crying. RP A 91-92. Nora Goodson told her she had had an "altercation" with Robert and that he "choked" her. RP A 92. A little later, Nora Goodson showed up at Jessica's home. RP A 92. Nora Goodson told Jessica that when she woke up, Mr. Goodson was on top of her "choking her." RP A 92. Nora Goodson had marks on her face and neck. RP A 92. Nora Goodson expressed fear of her husband. RP A 94. Jessica called the medics. RP A 94.

Jessica wrote a statement for the police. RP A 94. The statement was admitted without objection. RP A 94; Supp. DCP, Exhibit 7. Jessica was also aware Nora Goodson wrote a statement for the police although Jessica was not present when it was written. RP B 262-64. The prosecutor moved to admit Nora Goodson's statement and defense counsel objected only because the basis for admission had not been adequately developed. RP B 264-65. The state argued defense counsel opened the door to the admission of the statement by mentioning it. The court agreed and allowed the handwritten statement to be admitted. RP B 264; Supp DCP,

Exhibit 6. The statement was ostensibly signed by Nora and sworn to under the penalty of perjury. In the statement, Nora wrote Mr. Goodson put her in a "choke hold." Exhibit 6.

Jessica listened to recorded jail phone calls and identified the two parties speaking in all but one call as her parents. RP A 94, 95, 104, 119; RP B 258. In one call, Nora Goodson talked to Mr. Goodson about how he had done nothing to her other than be grouchy. RP A 183. In other phone calls, Nora says that things have been taken out of context and overblown. RP A 115, 130, 159, 162, 182, 199.

Lewiston Police Officer Michael Rigney was the initial police officer dispatched on the complaint. RP A 78. He was summoned by medics. RP A 79. Officer Rigney testified, without objection, to the details of the dispatch received via notes on a computer. RP A 78. He was told a female was involved in a domestic violence situation and possibly beat up and it was an attempted strangulation. RP A 78. When he saw Nora Goodson, she had facial injuries and possible injuries to the area around her neck. RP A 79. The prosecutor asked Officer Rigney if the injuries were consistent with strangulation and he said "really consistent with that" as he had seen in these types of cases before. RP A 79. He testified without objection. RP A 79. There was no testimony about Officer Rigney's actual

training to identify strangulation. RP A 80. The medics did not transport Nora Goodson. RP A 83.

Because the incident occurred in Clarkston, Washington, Asotin County Sheriff's Detective Jackie Nichols took over the police investigation. RP B 291-92. Officer Rigney told her the incident was reported as a strangulation and that Nora Goodson did not want to come to Clarkston because she was afraid. RP B 292. Detective Nichols spoke with Nora Goodson after the medics left. RP B 292. Detective Nichols photographed marks on Nora Goodson's face and neck. RP B 293. Detective Nichols felt the marks on Nora's neck were consistent with the "victim's account." RP B 293-94.

Detective Nichols testified to concern for Nora Goodson's wellbeing. Detective Nichols testified, without objection, that domestic violence strangulation is potentially lethal. RP B 295. Detective Nichols also testified strangulation is probably the most lethal form of domestic violence and that a victim can be unconsciousness within seconds and dead within minutes. RP B 295. She also offered that strangulation is one of the ultimate forms of power and control where the perpetrator exerts control over the victim's very next breath and it can lead to devastating psychological effects and has a potentially fatal outcome. RP B 296. "And

in 50 percent of domestic violence homicides, there was a prior instance of strangulation in the relationship." RP B 296. She also said victims of domestic violence are seven more times likely to be victims of homicide or attempted homicide. RP B 296. She spoke with Nora about a safety plan. RP B 296. Defense counsel did not object to any of this testimony. RP B 295-96.

Detective Nichols reached Mr. Goodson by phone and spoke with him briefly. RP B 297. Detective Nichols opined that by alerting Mr. Goodson to the arrest warrant she raised the danger level for Nora Goodson. RP B 299. Detective Nichols arrested Mr. Goodson the next day at his home. Nora Goodson was with him. RP B 300, 337, 341. Nora did not want her husband charged with a felony offense. RP B 338.

In questioning Detective Nichols, the state asked if Nora Goodson told her how she got the marks on her neck. She responded that Nora told her Mr. Goodson "choked" her. RP B 341. Detective Nichols offered that most people refer to strangulation as choking. RP B 341. The state asked about the difference in the terms. Detective Nichols explained choking is internal blockage of the airway and strangulation is external blockage and that strangulation is ligature or manual. RP B 341-42. RP B 342. Also under the state's questioning, Detective Nichols explained that strangulation is

a felony because it can so quickly become a fatality. RP B 342. Defense counsel objected to none of the testimony. RP B 295-345.

Detective Nichols listened to some of the recorded phone calls from the jail and felt Mr. Goodson was at times demeaning toward Nora Goodson. RP B 329. Defense counsel offered no objections. RP B 329.

Mr. Goodson did not testify and presented no defense witnesses. RP B 346.

In closing argument, the state reiterated what "choke" really means to most people, i.e., to strangle. RP B 378. The state also talked about strangulation being a felony because of the permanent psychological damage and death that can result, revisited Detective Nichols thinking Nora Goodson needed a safety plan, and opined they were lucky not to be trying a homicide. RP B 379-389.

The state's closing argument concluded with the prosecutor telling the jury they had to tell him where any reasonable doubt came from and how it was reasonable. RP C 411.

D. ARGUMENT

Issue 1. Cross-examination of witness Jessica Ongstead only to the extent that her mother wrote a statement for the police did not open the door to the admission of the written statement or its use as substantive evidence.

a. The policy behind the "opening the door" rule.

When examining a witness, a party may "open the door" to a subject of inquiry on cross or redirect. Thus," [w]here the defendant 'opened the door' to a particular subject, the State may pursue the subject to clarify a false impression." *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009) (citing *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)). The purpose of the rule is "to prevent a party from mischaracterizing evidence by only revealing advantageous details of a particular subject." *City of Seattle v. Pearson*, 192 Wn. App. 802, 819, 369 P.3d 194 (2016).

A trial court has considerable discretion in administering the open-door rule. *Ang v. Martin,* 118 Wn. App. 553, 562, 76 P.3d 787 (2003). A trial court's decision under the open-door rule is reviewed for an abuse of discretion. *State v. Ortega,* 134 Wn. App. 617, 626, 142 P.3d 175 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. Lord,*

161 Wn.2d 276, 283–84, 165 P.3d 1251 (2007). A trial court abuses its discretion when basing its decision on an erroneous interpretation of the law or applying an incorrect legal analysis. *Sastrawidjaya v. Mughal*, 196 Wn. App. 415, 418–19, 384 P.3d 247 (2016).

b. Mr. Goodson's inquiry into only Jessica Ongstead's knowledge of Nora Goodson's written statement did not "open the door" to the statement itself being submitted to the jury.

The trial court's abuse of discretion in admitting Nora Goodson's written statement – Exhibit 6 – is twofold. First, defense counsel merely referred to the statement in his cross examination of Nora Goodson's daughter, Jessica Ongstead. The entire question and answer went

> Defense: Ah, you identified a written statement that you wrote –
> A: -- Yes –
> Q: -- for the officers. Did your mom write one too?
> A: Yes.
> Q: Did you help her write it?
> A: No, she went away with the police officer and wrote it.
> Q: Okay.
> A: I stayed there until the police officers were gone and then I went to work late.

RP B 262.

The "open the door" doctrine is deemed to promote fairness and truth-seeking. In relation to the doctrine, it is often written that

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further

> inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

Ang, 118 Wn. App. at 562 (quoting *Gefeller,* 76 Wn.2d at 455).

Here, Mr. Goodson's questions were limited only to whether Nora Goodson wrote a statement. He did not inquire into the content of the statement. He gained no advantage over the state by merely inquiring whether a statement was written. Presumably, Jessica Ongstead knew nothing about the statement's content because she was not with her mother when she wrote it. RP B 262. The mere inquiry into the existence of the statement creates no disadvantageous half-truths. The state could engage in redirect examination with Jessica Ongstead to the limited capacity to which she had direct knowledge, that her mother went away with the police and wrote a statement and that she recognized the statement as something her mother wrote. RP B 264.

c. No legal basis exists to have admitted Nora Goodson's statement as substantive evidence and its admission violated Mr. Goodson's state and federal right to confrontation.

The state argued because Mr. Goodson made Nora Goodson's written statement known, the jury has the right to see the statement because Mr. Goodson "brought it to the fore" and, as it was signed under

the penalty of perjury, it was self-authenticating. RP B 264-65. But neither of those arguments usurp Mr. Goodson's constitutional right to confrontation.

The Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine witnesses against them.[3] *State v. Mares*, 160 Wn. App. 558, 561–62, 248 P.3d 140 (2011). Statements of an absent witness may not be admitted if the statement is testimonial, unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington,* 541 U.S. 36, 53–54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *Davis v. Washington,* 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

Nora Goodson's written statement was testimonial. Testimonial statements include documents "created solely for an 'evidentiary purpose,' ... made in aid of a police investigation." *State v. Wade,* 186 Wn. App. 749, 769, 346 P.3d 838, *review denied,* 184 Wn.2d 1004 (2015). While Nora was arguably unavailable as a witness because she could not be located for service, there was no record of a prior opportunity to cross-

[3] The Sixth Amendment to the United States Constitution applies to the states via the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

examine her about her statement. It was error to admit her statement as substantive evidence.

Violations of the confrontation clause are subject to harmless error analysis. *State v. Davis,* 154 Wn.2d 291, 304, 111 P.3d 844 (2005), *aff'd by Davis v. Washington,* 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). In determining whether a constitutional error is harmless, courts apply the overwhelming untainted evidence test. *Davis,* 154 Wn.2d at 305. "Under that test, where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless." *Davis,* 154 Wn.2d at 305 (citing *State v. Smith,* 148 Wn.2d 122, 139, 59 P.3d 74 (2002)).

Here, as argued in the issues below, so little of the evidence was untainted by prosecutorial misconduct or ineffective assistance of counsel it cannot be said the remaining testimony would have led to a finding of guilt. No one other than the Goodsons were witness to what happened. The admission of Nora Goodson's written statement is reversible error.

Issue 2. Multiple instances of prosecutorial misconduct denied Mr. Goodson a fair trial.

The Sixth Amendment to the United States Constitution guarantees a defendant a fair, although not an error-free, trial. *Fisher*, 165 Wn.2d at 746–47. The burden to establish prosecutorial misconduct is on the defendant, who must show that the prosecuting attorney's conduct was both improper and prejudicial. *Id*. at 747. Prosecutorial misconduct is grounds for reversal when there is a substantial likelihood that the improper conduct affected the jury. *Id*. In analyzing prejudice, the court examines the improper conduct in the context of the total argument, the issues in the case, the evidence, and the jury instructions. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

The State's misconduct was improper in several ways: presenting irrelevant and prejudicial evidence about the lethality of strangulation; presenting irrelevant and prejudicial evidence why strangulation is a felony; presenting testimony that when people say "choke" they mean "strangle"; by making an improper emotional plea in closing argument when telling the jury they were fortunate not to be trying a homicide; by telling the jury Mr. Goodson held Nora Goodson's life in his hands; and

by telling the jury they had to tell the prosecutor their reasons for doubting Mr. Goodson's guilt.

Failure to object to the misconduct constitutes waiver on appeal unless the misconduct is so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice and this prejudice cannot be cured by a jury instruction. *Fisher*, 165 Wn.2d at 747. Although Mr. Goodson did not object to the numerous instances of prosecutorial misconduct articulated above, the prosecutor's flagrant and ill-intentioned acts resulted in incurable prejudice and requires reversal of Mr. Goodson's assault in the second degree conviction.

a. Opinion on the lethality of strangulation, the need for a victim of strangulation to be safe, and why strangulation is a felony is irrelevant and only prejudicial.

To convict Mr. Goodson of assault in the second degree by strangulation, the jury had to find Mr. Goodson intentionally assaulted Nora Goodson by strangulation. Supp. DCP. Court's Instructions to the Jury (Instruction 9). Strangulation means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so intending to obstruct the person's blood flow or ability to breathe. Supp. DCP, Court's Instruction to the Jury (Instruction 8).

But rather than focusing its evidence on the required elements, the state resorted to emotionally-impactful irrelevant opinion evidence about the lethality of strangulation and the need for an alleged strangulation victim to seek protection from her alleged abuser after the fact. The state did this throughout its questioning of Detective Nichols and in closing argument all with no objection from defense counsel.

> PROSECUTOR NICHOLS: [O]nce you spoke to Nora were you concerned about her wellbeing?
>
> DETECTIVE NICHOLS: Yes.
>
> PROSECUTOR NICHOLS: Why were you concerned about her wellbeing?
>
> DETECTIVE NICHOLS: Ah, from my training and experience, ah, regarding domestic violence strangulation, it's a very potentially lethal situation.

RP B 295.

> DETECTIVE NICHOLS: The strangulation is probably one of the most lethal forms of domestic violence. It can lead to unconsciousness in seconds; it can lead to death within a minute. Strangulation is one of the ultimate forms of power and control where the perpetrator, ah, exerts control over the victim's very next breath. Ah, this can lead to devastating psychological effects and, ah, it has a potentially fatal outcome.

RP B 295.

> PROSECUTOR: What about lethality in domestic violence relationships?

> DETECTIVE NICHOLS: Ah, in over 50 percent of – or up to 50 percent of domestic violence homicides there was a prior incident of strangulation in the relationship. Ah –

...

> The victim of, ah, domestic violence strangulation are seven times more likely to, to be, ah, a victim of, ah, homicide or attempted homicide.
>
> PROSECUTOR NICHOLS: With that in mind, you were concerned about Ms. Goodson's wellbeing?
>
> DETECTIVE NICHOLS: Yes, very.
>
> PROSECUTOR NICHOLS: What did you, ah, attempt to do to protect her based on that information?
>
> DETECTIVE NICHOLS: I spoke with her about safety planning right from the very moment, ah where she was at, where she could go, what her options were as far as the Y or where she was at.... [A]nd to make sure she had a phone, so she could 911 where she was at. And, ah, that she would be safe while we were trying to locate Robert and speak to him.

...

RP B 296.

> PROSECUTOR NICHOLS: And, ah, did you discuss again with her the – the safety plan and what she needed to be – do to be safe?
>
> DETECTIVE NICHOLS: Yes, I wanted her to be aware that Robert was now aware of the police report and that we were actively looking for him, ah, which I felt raised her danger level even higher, wanted to be sure she was aware of that and could safely plan.

RP B 299-300.

...

> PROSECUTOR NICHOLS: Did you talk to her about what you could do or what she could do to be safe from Robert?

...

> DETECTIVE NICHOLS: Yes.
>
> PROSECUTOR NICHOLS: What did you suggest?
>
> DETECTIVE NICHOLS: I suggested she could go to the Y. Ah, she said that she wanted to stay at her daughter's house. And then we talked about locking the doors, making sure she had a phone. Ah, if Robert were to show up, that she was going to call 911. Things like that.

RP B 345.

> PROSECUTOR NICHOLS: What did Nora say about why – she, about Robert being charged with a felony?
>
> DETECTIVE NICHOLS: She ah, said she didn't understand why he was being charged with a felony and I explained to her that strangulation is a felony and the reason it's so serious is because strangulation is – is so – can lead so quickly to a fatality.

RP B 343.

With no regard for relevancy, the state also solicited Detective Nichols' opinion about Mr. Goodson's demeanor while talking to his wife on the phone:

> PROSECUTOR NICHOLS: What about Mr. Goodson, ah, did you notice anything significant about the way he talk to Nora in the course of these [phone] conversations?
>
> DETECTIVE NICHOLS: The conversations I heard he was demeaning towards her, called her names, and she was stupid, things like that.

PROSECUTOR NICHOLS: Told her what to do?

DETECTIVE NICHOLS: Yes.

PROSECUTOR NICHOLS: What was Mr. Goodson's reaction when Nora appeared not to understand what he was telling her to do or – or didn't seem to have followed through on what he told her to do?

DETECTIVES NICHOLS: He would ask her if she heard him or he would call her, ah, demeaning names.

RP B 329.

b. The prosecutor returned to improper themes in his closing argument and rebuttal closing argument.

PROSECUTOR NICHOLS: Did he deny strangulation? Maybe it's because he didn't understand strangulation constitutes a felony assault. Why? Detective Nichols sat right there and told you why; she told Nora Goodson why. Because it is that close to death. Strangulation can cause loss of consciousness in second – seconds. Permanent psychological damage; you control their last breath.

RP B 379.

The prosecutor left the jury with this last thought before turning closing over to Mr. Goodson:

PROSECUTOR NICHOLS: But more important, look at the facts of the case and consider how lucky we are trying a case of ah, assault in the second degree and not one of those one in seven people having been the victim of strangulation assault in a domestic violence setting end up causalities.

RP B 389.

And returned again in rebuttal argument to leave the jury with this thought:

> PROSECUTOR NICHOLS: We're talking about strangulation. Not a fleeting thing, not a momentary thing, not an accidental contact, but an intentional act to control the victim, to control their very life, to have their life in your hands, and to let them know I could take you out, you're done if I choose to.

RP B 410-11.

c. Another improper theme in the state's case and reinforced in the prosecutor's closing argument is what Nora Goodson really meant when she used the word "choke".

During its redirect examination of Detective Nichols, the state elicited the following testimony:

> PROSECUTOR NICHOLS: Detective Nichols, let's go from probably or possibility to reality. Did Nora Goodson tell you how she got the mark on her neck?
>
> DETECTIVE NICHOLS: She told me she was choked by Bob and choked is a miss, ah – the – people commonly refer to strangulation as choking.
>
> PROSECUTOR NICHOLS: What's the difference?
>
> DETECTIVE NICHOLS: Ah, choking is an internal blockage of the airway, strangulation is an external blockage of the airway. Ah, you choke on food; you are strangled by a manual or a ligature or object.

RP B 341-42.

And again.

PROSECUTOR NICHOLS: What did [Nora] say about that?

PROSECUTOR NICHOLS: She said that she had come back to the house on her own accord, ah, the previous night and that they had talked about why the charge was a felony and that they had discussed that it, perhaps, was due to being what they called choking.

RP B 343.

The state continued its irrelevant themes in closing argument.

PROSECUTOR NICHOLS: [Nora] provided a written statement to Detective Nichols and you have that statement in Nora's own words signed under oath "He put me in a chokehold". You have Jessica Ongstead's written statement; "He choked her out". Detective Nichols, I thought, did a very good job of explain the difference. A lot of times people – we – we say things and we don't use the right word. I've heard people say my house got robbed, when what they really mean is my house was burglarized. Robbery is not what you have do at night when you sneak in through the window; robbery's what you do when you pull the gun and say give me (inaudible). We get it wrong. You choke on a piece of meat; you choke on -- on -- on your words; you choke. Strangulation is the external blockage. So, let's understand that when lay people say choke they mean strangle.

RP B 378.

The prosecutor's final error in closing argument was to assure the jury they would have to answer to him if they found reasonable doubt and acquitted Mr. Goodson.

Ladies and gentlemen, if you have any doubt that Bob Goodson didn't need to choke Nora – I'm sorry – to strangle Nora Goodson, that he did not intentionally impair her ability to breathe and the blood flow, then find him not guilty. But tell me where that doubt

> comes from? Tell me what reason you have to doubt and tell me how that is reasonable.

RP C 411.

d. The state's emotionally charged and irrelevant themes exceeded the bounds of appropriate advocacy.

A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasi-judicial capacity in a search for justice. *State v. Case,* 49 Wn.2d 66, 70–71, 298 P.2d 500 (1956). Defendants are among the people the prosecutor represents. *State v. Monday*, 171 Wn.2d 667, 675–76, 257 P.3d 551 (2011). The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. *Id.* at 71. A prosecutor must function within boundaries while zealously seeking justice. *Id.*

Here the state's advocacy far and away exceeded any reasonable boundaries of zealously seeking justice. The lethality of strangulation has no bearing on the elements of strangulation which is what the state was charged with proving. The prosecutor's assurance to the jury in closing argument that they were lucky not to be trying a homicide and that Mr.

Goodson had Nora's life in his hands were purely an emotional appeal. RP B 389.

Detective Nichols' concern for Nora Goodson's safety and her insistence that Nora create a safety plan is irrelevant to whether Mr. Goodson committed each elements of strangulation. RP B 392. Assuring the jury Nora Goodson really meant *strangulation* when she only referred to *choking* had no place in a fair trial. And the prosecutor's threat to the jury in his rebuttal closing argument that they would have to "tell" him where their reasonable doubt came from is beyond the pale of zealous advocacy by any reasonable standard.

Issue 3. Multiple instances of ineffective assistance of counsel deprived Mr. Goodson his right to counsel.

To establish ineffective assistance of counsel the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Kyllo*, 166 Wn. 2d 856, 862–63, 215 P.3d 177 (2009). Deficient performance is falling "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland,* 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). The prejudice prong requires the defendant to prove there

is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt,* 111 Wn.2d 66, 72, 758 P.2d 982 (1988). If either element of the test is not satisfied, the inquiry ends. *State v. Hendrickson,* 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

There is a strong presumption that counsel's performance was reasonable. *State v. Studd,* 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. *McFarland,* 127 Wn.2d at 336. A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). None of counsel's many deficiencies can be characterized as a legitimate trial tactic or strategy.

As argued above, the lethality of strangulation had no bearing on whether Mr. Goodson strangled Nora Goodson. Under ER 402, "Evidence which is not relevant is not admissible." There was no possible tactical reason for trial counsel to not object to the Detective Nichols' inflammatory and irrelevant testimony about the lethality of strangulation. *State v. McLean*, 178 Wn. App. 236, 247, 313 P.3d 1181 (2013). The same holds true for defense counsel's failure to object to the

state's evidence that strangulation is a felony because it is so serious and lethal.

Defense counsel's failure to object to the state soliciting from Detective Nichols when people say "choke" they mean "strangle" – as did Mrs. Goodson – it denied Mr. Goodson effective assistance of counsel. RP B 341-42. Absent Nora Goodson's testimony, the state was left with what they had which Nora was specifying she had been "choked." What that meant to Nora Goodson in the context of the allegations, without Detective Nichol's assumption of what Nora meant, was a question to be decided by the jury.

Defense counsel failed to object to the state's emotional appeal to the jury in closing argument. "[C]onsider how lucky we are to be trying a case of, ah, assault in the second degree and not one of those one in seven people having been the victim of strangulation assault in a domestic violence setting end up casualties." RP B 389. Defense counsel's failure to object denied Mr. Goodson effective assistance of counsel. The argument had no relevancy to the prosecution of the assault in the second degree. Similarly, defense counsel's failure to object to the state's emotional appeal in closing argument that Mr. Goodson had Nora Goodson's life in his hands denied Mr. Goodson effect assistance of counsel.

The only purpose of the state's arguments was to inflame the jury's passion and prejudice against Mr. Goodson. "We're talking about … an intentional act to control the victim, to control their very life, to have their life in your hands, and to let them know I could take you out, you're done if I choose to." RP C 410-11. Lethality had no relevance to the assault charge and to invoke it over and over again – with no objection from defense counsel – denied Mr. Goodson effective representation.

Defense counsel's failure to object to the prosecutor telling the jury they had to tell him what reasons they had to doubt the evidence also denied Mr. Goodson effective assistance of counsel. RP C 411. When a jury retired to deliberate they should not do so with the mistaken impression they will have to answer to the state for their decisions. Defense counsel's failure to object to the mischaracterization sent the jury into deliberation with an incorrect obligation weighing on them.

Defense counsel Mr. Laws' violation of the Rules of Professional Conduct (RPC) denied Mr. Goodson effective assistance of counsel. Per RPC 3.4, "A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act[.]" Here defense counsel Laws

"implored" Nora Goodson to leave the courthouse during trial even though he knew she had an outstanding material witness warrant to appear at the trial. CP 57-59. Defense counsel assured the court during trial that Nora Goodson was crucial to his defense and he wanted to cross examine her. RP B 280. Yet, with Detective Nichols left as the state's last witness, a witness not helpful to the defense, defense counsel Laws "implored" Nora Goodson, his only witness, a witness crucial to the defense of Mr. Goodson, and in contravention of the material witness warrant, to leave the courthouse before anyone noticed she was there. CP 57.

In a similar fashion, the taint of defense counsel likely committing a crime during trial similarly denied Mr. Goodson effective assistance of counsel. A person is guilty of tampering with a witness if he attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding to (a) withhold any testimony or (b) absent herself from such a proceedings. RCW 9A.72.120. Defense counsel's imploring Nora Goodson to leave the courthouse rather than honor the outstanding material witness warrant, constitutes the crime of tampering with a witness. Defense counsel's behavior undermines trust and confidence in the justice system and brings into doubt his

competence to represent a citizen such as Mr. Goodson facing up to 10 years in prison on a class B felony.

Defense counsel was also ineffective in failing to object to Lewiston Police Officer Michael Rigney's irrelevant hearsay. Officer Rigney testified to being dispatched via a message on his computer screen to a domestic violence situation where the victim was possibly beaten up and there was an attempted "strangulation". RP A at 78. While it might be relevant that Officer Rigney was dispatched to a call, an unidentified person's characterization of the dispatched event as a domestic violence incident where someone was beat up and strangled was hearsay. It was Officer Rigney's hearsay that introduced the concept of strangulation, versus the choking Nora Goodson referred to. RP A 78-79. Officer Rigney testified Nora Goodson's injuries looked "really consistent" with strangulation. RP A 80. And it was Officer Rigney who told Detective Nichols that the incident was a "strangulation" call. RP B 292. Defense counsel objected to none of this hearsay.

Defense counsel was ineffective too in failing to properly object to Nora Goodson's written statement being admitted into evidence. Defense counsel's only objection is the statement lacked an adequate foundation for admission. The correct objection, as argued above in Issue

1, was that the statement violated Mr. Goodson's right of confrontation. RP B 264.

Also problematic in defense counsel's representation of Mr. Goodson is his failure to object to Detective Nichols' repeated reference to Mrs. Goodson as a victim. RP B 291, 292, 296. Detective Nichols' characterization of Nora Goodson as the "victim" was a direct comment on Mr. Goodson's guilt. Whether Nora Goodson was a victim was a question for the jury rather than a foregone conclusion based on Detective Nichols' opinion.

Finally, defense counsel representation also fell below the standards of reasonable representation when he failed to object to Detective Nichols' irrelevant testimony that Mr. Goodson was demeaning toward Nora Goodson in some of their calls from the jail. RP B 329.

Issue 4. Cumulative instances of prosecutorial misconduct and ineffective assistance of counsel deprived Mr. Goodson a fair trial and effective representation.

Every criminal defendant has the constitutional due process right to a fair trial. U.S. Const. Amend. XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. *State*

v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007). The accumulation of errors discussed above affected the outcome and produced an unfair trial in Mr. Goodson's case. In essence, the state's and defense counsel's many errors placed a thumb on the scales of justice. Mr. Goodson's assault conviction should be reversed.

Issue 5. The judgment and sentence contains a misstatement on the date the jury returned its verdict. The mistake should be corrected.

The jury returned its verdict on all counts July 8, 2016. CP 63, 64. The judgment and sentence section 2.1 reflects a jury verdict date of July 9, 2016. CP 71. On remand, the trial court should correct the misstatement. *See, e.g., State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

Issue 6. The trial court exceeded its statutory authority in failing to consider Mr. Goodson's current and future ability to pay before imposing discretionary legal financial obligations.

Trial courts may order payment of legal financial obligations (LFOs) as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing LFOs unless "the defendant is or will be able to pay them." In determining LFOs, courts "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

The trial court imposed two discretionary LFOs. First, it imposed a $100 "domestic violence assessment" citing RCW 10.99.080 (the court "may impose a penalty assessment not to exceed one hundred dollars on any adult offender convicted of a crime involving domestic violence"). The statute's permissive language "may" reveals it to be a discretionary LFO. Similarly, the statute's suggestion that judges seek victims' impact regarding this penalty reveals its discretionary nature.

> (5) When determining *whether* to impose a penalty assessment under this section, judges are encouraged to solicit input from the victim or representatives for the victim in assessing the ability of the convicted offender to pay the penalty, including information regarding current financial obligations, family circumstances, and ongoing restitution.

RCW 10.99.080(5)(emphasis added).

Second, the court imposed a $750 fee for "court appointed attorney" citing RCW 9.94A.760 ("the court may order" a person [convicted in superior court] to "pay a legal financial obligation as part of the sentence." CP 75. Appointed trial counsel is a discretionary assessment. *State v. Clark*, 191 Wn. App. 369, 374, 362 P.3d 309 (2015).

Mr. Goodson's income was only $940 per month provided by social security disability. CP 6. It was the total household income available to support himself and his wife. At sentencing, the court asked the state what fees and costs it sought, got no immediate answer, and never returned to the issue. RP C 466. Defense counsel agreed to prepare the judgment and sentence and the two discretionary costs appear in type rather than in the judge's handwriting. CP 75. Nothing in the record reflects the trial court making the required individualized inquiry into Mr. Goodson's present and future ability to pay the two discretionary LFOs. RP C 458-67. The two discretionary LFO's should be vacated.

The Washington Supreme Court recognizes the "problematic consequences" LFOs inflict on indigent criminal defendants. *State v. Blazina*, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue at a 12 percent interest rate so that even those "who pay $25 per month toward

their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." *Id.* This, in turn, "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." *Id.* at 836-37. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." *Id.* at 837.

The *Blazina* court held that RCW 10.01.160(3) requires trial courts to first consider an individual's current and future ability to pay before imposing discretionary LFOs. *Id.* at 837-39. Instead, the "record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." *Id.*

The *Blazina* court further directed courts to look to GR 34 for guidance. *Id.* at 838. This rule allows a person to obtain a waiver of filing fees based on indigent status. *Id.* For example, courts must find a person indigent if he or she receives assistance from a needs based program such as social security or food stamps. *Id.* If the individual qualifies as indigent, then "courts should seriously question that person's ability to pay LFOs." *Id.* at 839. Only by conducting such a "case-by-case analysis" may courts

"arrive at an LFO order appropriate to the individual defendant's circumstances." *Id.* at 834.

At sentencing, the court failed to make an individualized inquiry into Mr. Goodson's current or future ability to pay LFOs. This Court should accordingly vacate the discretionary LFOs and remand for resentencing. *Id.* at 839.

In response, the state may ask this Court to decline review of the erroneous LFO order absent an objection below. The *Blazina* court held that the Court of Appeals "properly exercised its discretion to decline review" under RAP 2.5(a). *Blazina*, 182 Wn.2d at 834. The court nevertheless concluded that "[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." *Id*. Asking this Court to decline review would essentially ask this Court to ignore the serious consequences of LFOs. This Court should instead confront the issue head on by vacating Mr. Goodson's discretionary LFOs and remanding for resentencing.

A second reason this Court should review the issue is that, assuming it is otherwise waived, Mr. Goodson was denied his right to the effective assistance of counsel. As noted in Issue 3, every accused person enjoys the right to effective assistance of counsel under the Sixth

Amendment and art. I, § 22 of the Washington Constitution. *Strickland*, 466 U.S. at 685-86; *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (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.

Counsel's failure to object to the discretionary LFOs fell below the standard expected for effective representation. Counsel must have understood Mr. Goodson's financial situation because counsel knew he qualified for indigent defense services. There was no reasonable strategy for not insisting that the judge comply with the requirements of RCW 10.01.160(3) regarding discretionary financial liabilities. *See, e.g., Kyllo*, 166 Wn.2d at 862 (counsel has a duty to know the law); *State v. Adamy*, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel was deficient for failing to recognize and cite appropriate case law). Counsel's failure in this regard constitutes deficient performance.

Counsel's failure to object to the discretionary LFOs was also prejudicial. The hardships that can result from LFOs are numerous. *Blazina*, 182 Wn.2d at 835-37. Even without legal debt, those with criminal convictions have a difficult time securing stable housing and employment. LFOs exacerbate these difficulties and increase the chance of recidivism.

Id. at 836-37. In any remission hearing to set aside LFOs, Mr. Goodson will bear the burden of proving manifest hardship, and he will have to do so without appointed counsel. RCW 10.01.160(4); *State v. Mahone*, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

Blazina demonstrates there is no strategic reason for failing to object. Mr. Goodson incurs no possible benefit from LFOs. Given his indigency, there is a substantial likelihood the court would have waived all discretionary LFOs had he properly considered Mr. Goodson's current and future ability to pay. The court stated on the record its willingness to consider the state's position on LFO's and then the matter was dropped. RP C 467. Mr. Goodson's constitutional right to effective assistance of counsel was violated. This Court should also vacate the discretionary LFOs on this alternative basis.

Issue 7. In the event Mr. Goodson is unsuccessful in this appeal, this court should refuse to impose appellate costs.

Mr. Goodson preemptively objects to any appellate costs should the state be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), and pursuant to this Court's General Court Order issued on June 10, 2016.

Mr. Goodson was found indigent by the trial court and was represented by appointed counsel at trial and in these appellate proceedings. The trial courts Indigency Screening Form reflects that before being arrested on the underlying charges, Mr. Goodson did not work and relied on $940 per month Social Security Disability as his only income. That income must support his wife and himself. He does not own a home, he owes $12,000 on a 2010 Toyota Corolla, he has no money in savings, and he spends all of the SSD income received each month. CP 6-7. From his meager income, he pays what he can toward medical bills and back taxes. CP 7. At trial, daughter Jessica Ongstead described her father's financial situation as merely "surviving." RP B 263. Imposing costs under these circumstances would contravene those principles enumerated in *Blazina*. *Blazina*, 182 Wn.2d at 835-37.

In *Blazina*, our Supreme Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, this Court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." *Blazina*, 182 Wn.2d at 834. Only by conducting such a

"case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively affect indigent appellants' ability to move on with their lives in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our Supreme Court's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that *Blazina* held was essential before including monetary obligations in the judgment and sentence.

Furthermore, the *Blazina* court instructed *all* courts to "look to the comment in GR 34 for guidance." *Blazina*, 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The *Blazina* court suggested, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. Mr. Goodson meets the GR 34[(a)(3)] test because he received assistance under SSD, a federal needs-based program, prior to his incarceration on the current convictions.

This court receives orders of indigency "as a part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

This court has discretion to deny appellate costs. RCW 10.73.160(1) states the "supreme court . . . may require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000); *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), too, acknowledged appellate courts have discretion to deny the state's requests for costs. *Blank*, 131 Wn.2d at 252-53.

The record demonstrates Mr. Goodson does not have the ability to pay costs on appeal. He was found indigent by the trial court, CP 6-7, and remains indigent. CP 96-97. Mr. Goodson respectfully requests this Court exercise its discretion by denying an award of appellate costs, if the state substantially prevails on appeal.

E. CONCLUSION

Mr. Goodson's assault conviction should be reversed. His confrontation right was violated by the admission of non-testifying Nora Goodson's written statement. Additionally, multiple instances of prosecutorial misconduct and ineffective assistance of counsel denied Mr. Goodson a fair trial.

Alternatively, the discretionary LFOs should be stricken from Mr. Goodson's judgment and sentence and the scrivener's error corrected to reflect the correct date.

Finally, if Mr. Goodson does not prevail on this appeal, he preemptively objects to any appellate costs being imposed against him.

Respectfully submitted June 9, 2017.

LISA E. TABBUT/WSBA 21344
Attorney for Robert Goodson

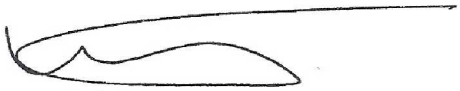
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Asotin County Prosecutor's Office, at bnichols@co.asotin.wa.us; (2) the Court of Appeals, Division III; and (3) I mailed it to Robert Goodson/DOC#917322, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

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

Signed June 9, 2017, in Winthrop, Washington.



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