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NO. 34999-3-III
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA AVALOS,
Appellant.

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

Grant County Cause No. 16-1-00244-0

The Honorable John D. Knodell, Judge

BRIEF OF APPELLANT

Skylar T. Brett
Attorney for Appellant

Law Offices of Lise Ellner
P.O. Box 2711
Vashon, WA 98070
(206) 494-0098
skylarbrettlawoffice@gmail.com

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ISSUES AND ASSIGNMENTS OF ERROR

1. Evidence that Mr. Avalos had no recorded employment in Washington State was inadmissible under ER 401 and 402.
2. Evidence that Mr. Avalos had no recorded employment in Washington State was inadmissible under ER 403.
3. Evidence that Mr. Avalos had \$2,000 in cash in his pocket a few days before his arrest was inadmissible under ER 401 and 402.
4. Evidence that Mr. Avalos had \$2,000 in cash in his pocket a few days before his arrest was inadmissible under ER 403.
5. Evidence that Mr. Avalos had paid for a used car in cash on an unspecified date was inadmissible under ER 401 and 402.
6. Evidence that Mr. Avalos had paid for a used car in cash on an unspecified date was inadmissible under ER 403.
7. Evidence that Mr. Avalos had \$1,000 in cash on the day of his arrest was inadmissible under ER 401 and 402.
8. Evidence that Mr. Avalos had \$1,000 in cash on the day of his arrest was inadmissible under ER 403.
9. Mr. Avalos was prejudiced by the improper admission of evidence of his financial situation.

ISSUE 1: Evidence of an accused person's financial state is generally inadmissible as evidence of a crime because it is of only slight probative value and is highly prejudicial. Did the trial court err by admitting evidence that Mr. Avalos had no reported employment in Washington State but had access to large amounts of cash when there was no evidence that any of the cash had been stolen but the state encouraged the jury to infer that it was stolen because Mr. Avalos did not offer any evidence that it came from a legitimate source?

10. Evidence of Mr. Avalos's prior contact with the police was inadmissible under ER 404(b).
11. Evidence of Mr. Avalos's prior contact with the police was inadmissible under ER 403.
12. Mr. Avalos was prejudiced by the improper admission of his prior contact with the police.

ISSUE 2: Evidence of an accused person's prior police contact is inadmissible under ER 404(b) because it encourages an improper inference of general criminality. Did the court err by admitting evidence that Mr. Avalos was contacted by the police, resulting in his car being towed five days before the allegations for which he was charged?

13. The trial court erred by refusing to give Mr. Avalos's proposed instruction informing the jury that it should not consider the cash in his pocket to be stolen property.

ISSUE 3: When a court admits evidence only for a limited purpose, it must give an instruction limiting the jury's consideration of the evidence to that purpose, if requested by the party against whom it was admitted. Did the court err by refusing to give Mr. Avalos's proposed limiting instruction when the court admitted the evidence of the cash in his pocket only for the limited purpose of establishing knowledge?

14. Prosecutorial misconduct deprived Mr. Avalos of his Sixth and Fourteenth Amendment right to a fair trial.
15. The prosecutor at Mr. Avalos's trial committed misconduct by making an argument designed to shift the burden of proof.
16. The prosecutor's misconduct was flagrant and ill-intentioned.

ISSUE 4: A prosecutor commits misconduct by making an argument designed to shift the burden of proof onto the defense. Did the prosecutor commit misconduct at Mr. Avalos's trial by arguing that the jury should find that the money he possessed was stolen because he had not shown that it came from a legitimate source?

17. The cumulative effect of the errors at trial requires reversal of Mr. Avalos's conviction

ISSUE 5: The cumulative effect of errors during a trial can require reversal when, taken together, they deprive the accused of a fair trial. Does the doctrine of cumulative error require reversal of Mr. Avalos's conviction when errors by the court and the prosecutorial misconduct worked together to encourage

the jury to find him guilty because he did not present evidence explaining how he had access to large amounts of cash?

18. Mr. Avalos's conviction for possession of stolen property violated his Sixth and Fourteenth Amendment right to an adequate charging document.
19. Mr. Avalos's conviction for possession of stolen property violated his state constitutional right to an adequate charging document under Wash. Const. art. I, §§ 3 and 22.
20. The charging document failed to set forth the critical facts related to the charges against Mr. Avalos.
21. The charging document failed to charge Mr. Avalos with possession of "specifically described property."

ISSUE 6: An Information charging a theft-related offense must "clearly" charge the accused with a crime relating to "specifically described property." Was the language charging Mr. Avalos with possession of stolen property constitutionally deficient when it did not include any language describing the stolen property that he allegedly possessed?

22. The sentencing court exceeded its statutory authority by ordering Mr. Avalos to pay \$1,000 in restitution.
23. The restitution ordered in Mr. Avalos's case was not "causally connected" to the offense of his conviction.
24. The court did not have authority to order restitution in Mr. Avalos's case under RCW 9.94A.753.

ISSUE 7: A sentencing court exceeds its statutory authority by ordering an offender to pay restitution that is not causally connected to the offense of his/her conviction. Did the court exceed its authority by ordering Mr. Avalos to pay restitution for money he possessed, which was never shown to have been stolen and for which he was not charged?

25. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 8: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals

decline to impose appellate costs because Mr. Avalos is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Joshua Avalos was pulled over for driving with a suspended license. RP (12/14/16) 84; RP (12/15/16) 263. There were four passengers in his car. RP (12/14/16) 84-85.

As soon as Mr. Avalos stopped the car, one of the passengers got out and ran away. RP (12/14/16) 85. The police never caught or identified that passenger. RP (12/14/16) 102.

The officers found a backpack in the backseat of the car that Mr. Avalos had been driving. RP (12/14/16) 103. It contained some documents and jewelry linked to a burglary that had happened a few weeks prior. RP (12/14/16) 87; RP (12/15/16) 251. Documents related to Mr. Avalos were also inside the backpack. RP (12/14/16) 90-91, 95. Mr. Avalos also had about \$1,000 in cash and a rubber band in his pocket. RP (12/14/16) 89.

The police never found the vast majority of the jewelry and other items that had been stolen during the burglary. RP (12/14/16) 109; RP (12/15/16) 250; Ex. 36 (listing stolen items). About \$10,000 had also been taken during the burglary, some of it held together by rubber bands. RP (12/15/16) 146-47.

The state charged Mr. Avalos with burglary, theft, possession of stolen property in the second degree, and trafficking in stolen property. CP 17-19. The burglary, theft, and trafficking charges were all dismissed pre-trial because there was no evidence that Mr. Avalos had done anything except possibly possess some of the property that had been stolen. RP (5/31/16) 25-27; RP (8/23/16) 49-54.

The charging language related to the possession charge – the only remaining charge – reads as follows:

On or about the 31st day of August, 2015 the above-named Defendant did, knowingly receive, retain, possess, conceal, or dispose of stolen property, knowing that it had been stolen, and did withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto, said property being in excess of seven hundred fifty dollars (\$750.00) but less than five thousand dollars (\$5,000.00) in value...
CP 18.

The state's theory at trial was that the cash in Mr. Avalos's pocket must have been stolen because he did not appear to be employed. RP (12/14/16) 12-17. If Mr. Avalos wanted to rebut that theory, the state claimed, he could argue to the jury that he might have a rich uncle or some other legitimate source of income. RP (12/14/16) 17.

Over Mr. Avalos's objection, the state called a witness from the Employment Security Division to testify that Mr. Avalos had not had on-

the-books employment in Washington State between 2013 and the time of trial. RP (12/14/16) 12-16, 75; RP (12/15/16) 123-34, 206-09.

Also over Mr. Avalos's objection, the court allowed the state to present testimony that Mr. Avalos had police contact, which resulted in his car being towed five days before the incident for which he was charged. RP (12/14/16) 30-32; RP (12/15/16) 170, 175, 177-80. The state sought the evidence so the jury could learn that Mr. Avalos had had about \$2,000 in cash on that date as well. RP (12/14/16) 30-32; RP (12/15/16) 170. The court ruled that the evidence was admissible because Mr. Avalos had no apparent source of income, which permitted the inference that the money had been stolen. RP (12/15/16) 175.

The trial court also admitted, over Mr. Avalos's objection, evidence that he had bought a used car for \$4,000 in cash on some unspecified date. RP (12/14/16) 75, 79.

Finally, Mr. Avalos objected to the admission of the cash that he was carrying on the day of his arrest. RP (12/15/16) 233-34. He pointed out that there was nothing tying the cash to the burglary, nothing identifiable about the bills, and no evidence regarding what denominations of bills had been stolen (and, thus, no evidence that the money he possessed was in those same denominations). RP (12/15/16) 233.

The court ruled that the cash was admissible because it was relevant to Mr. Avalos's knowledge that the other items in the backpack had been stolen. RP (12/15/16) 242.

But the court refused to give Mr. Avalos's proposed jury instruction, which would have limited the jury's consideration of the cash for that purpose. RP (12/15/16) 22. The limiting instruction, if it had been given, would have told the jury that:

In considering the charge of Possession of Stolen Property 2nd Degree you are not to consider the money as stolen property. You may consider the other property items alleged to have been stolen and admitted into evidence in your deliberations.
CP 261.

The court did not give any other instruction regarding the proper purpose for which the jury could consider the cash. CP 263-84.

In closing argument, the prosecutor encouraged the jury to conclude that Mr. Avalos had stolen the money because he "doesn't work any kind of legitimate job" and there was no evidence of some other reasonable explanation for his possession of that much money. RP (2/16/16) 289.

The jury found Mr. Avalos guilty of possession of stolen property. RP (2/16/16) 311.

The court ordered Mr. Avalos to pay \$1,000 in restitution. CP 383-84. The court reasoned that the \$2,000 that Mr. Avalos possessed before

the incident for which he was charged must have been stolen and that the police had only recovered half of that amount when they seized the \$1,000 that he possessed on the day of his ultimate arrest. RP (1/30/17) 3-4. The court ordered Mr. Avalos to pay the difference of those two amounts. RP (1/30/17) 3-4; CP 383-84.

This timely appeal follows. CP 326-45, 385-89.

ARGUMENT

I. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE THAT ENCOURAGED THE JURY TO INFER THAT MR. AVALOS WAS MORE LIKELY TO HAVE STOLEN THE MONEY IN HIS POSSESSION BECAUSE HE DID NOT HAVE RECORDED EMPLOYMENT IN WASHINGTON STATE.

The state's theory at Mr. Avalos's trial was that he must have possessed stolen property because he had \$1,000 of cash in his pocket, had \$2,000 in cash a few days prior, and had bought a used car for \$4,000 but the prosecution was not aware of any means by which he could have obtained so much money. RP (12/14/16) 12-17.

To support this theory, the state offered evidence of the cash, the car sale, and evidence that he had not had on-the-books employment in Washington State for about three years, all over defense objection. RP (12/14/16) 30-32, 75, 78-79, 89; RP (12/15/16) 170, 206-09.

Then, in closing, the prosecutor argued that the jury should infer that the money was stolen because the jury had not been presented with

evidence that Mr. Avalos had obtained it from a lawful source. RP (2/16/16) 289.

But the state failed to present any evidence that Mr. Avalos did not normally carry large amounts of cash or that he had no other source of income (such as an inheritance, savings, off-the-books or out-of-state employment, owning a business or rental properties, investments, support by generous family members, a legal settlement, or government benefits). There was also no evidence that Mr. Avalos was generally unable to afford a used car.

Critically, there was also no evidence (such as marked bills or specific denominations of bills) linking the cash in Mr. Avalos's possession to the burglary. RP (12/15/16) 233.

Instead, the state's case regarding the cash rested only on the very tenuous presumption that a person with no recorded employment in the state would not have large sums of cash unless the money had been stolen. Accordingly, the evidence had virtually no probative value and carried a very high risk of unfair prejudice.

Under ER 403, evidence is inadmissible if its probative value is outweighed by the risk of unfair prejudice. ER 403. Irrelevant evidence is

also not admissible. ER 401, 402. Finally, ER 404(a) prohibits the admission of character evidence. ER 404(a).¹

Evidence of an accused person’s financial situation is generally inadmissible as evidence of a crime. *United States v. Mitchell*, 172 F.3d 1104, 1108 (9th Cir. 1999); *State v. Hilton*, 164 Wn. App. 81, 103, 261 P.3d 683 (2011); *State v. Kennard*, 101 Wn. App. 533, 541-42, 6 P.3d 38, review denied, 142 Wn.2d 1011, 16 P.3d 1267 (2000).

This is because, the evidence is of only slight probative value and “would be unfairly prejudicial to poor people charged with crimes.” *Mitchell*, 172 F.3d at 1108, 1110 (“That a person is feckless and poor, or greedy and rich, without more, has little tendency to establish that the person committed a crime to get more money, and its probative value is substantially outweighed by the danger of unfair prejudice”); *See also United States v. Zipkin*, 729 F.2d 384, 390 (6th Cir. 1984).

As explained by the *Mitchell* court:

The lack of money by A might be relevant enough to show the probability of A's desiring to commit a crime in order to obtain money. But the practical result of such a doctrine would be to put a poor person under so much unfair suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced

¹ Evidentiary rulings are reviewed for abuse of discretion. *State v. Slocum*, 183 Wn. App. 438, 449, 333 P.3d 541 (2014). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.*

Mitchell, 172 F.3d at 1108 (quoting II Wigmore, *Evidence* § 392 (Chadbourn rev.1979)).

Additionally, the *Zipkin* court noted that: “To establish motive for a theft offense by demonstrating impecuniosity of a defendant requires a chain of inferences that is highly speculative.” *Zipkin*, 729 F.2d at 390.

Accordingly, evidence of the accused’s financial status is only admissible when, under the facts of a specific case, “something more” raises its probative value above the risk of unfair prejudice. *Mitchell*, 172 F.3d at 1108. The *Mitchell* court provides the following hypothetical to demonstrate a situation in which this would be the case:

If a man is notoriously broke and cannot buy a pack of cigarettes Tuesday, that night a laundromat is burglarized, and on Wednesday the man buys a carton of cigarettes and a \$40 bottle of scotch, all with quarters, the man's financial circumstances have obvious and significant probative value.

*Id.*²

² Other cases provide additional examples of situations in which evidence of “something more” raises the probative value of evidence of the accused’s general poverty to a level at which it outweighs the risk of unfair prejudice. See e.g. *Hilton*, 164 Wn. App. at 103; *State v. Jones*, 93 Wn. App. 166, 175–76, 968 P.2d 888 (1998); *United States v. Feldman*, 788 F.2d 544 (9th Cir. 1986); *United States v. Jackson*, 882 F.2d 1444 (9th Cir. 1989). But none of those circumstances are present in Mr. Avalos’s case.

In *Hilton*, *Feldman*, and *Jackson*, for example, the evidence demonstrated that the accused could not afford basic expenses and was living beyond his/her means. But there was no evidence to that effect in Mr. Avalos’s case.

In *Jones*, evidence that the accused was unemployed was admissible to rebut the argument that the large amount of cash he possessed after an apparent drug deal had actually come from another lawful source. See *Jones*, 93 Wn. App. at 175-76. In that case, there was significant evidence, including eyewitness testimony, that Jones had engaged in drug

(Continued)

Mr. Avalos's situation was drastically different from the laundromat hypothetical in *Mitchell*.

First, there was no evidence that Mr. Avalos was "notoriously broke" or that he "[could] not buy a pack of cigarettes" before the alleged offense. *Id.* Rather, the state's evidence only showed that Mr. Avalos did not have on-the-books employment for about three years. RP (12/15/16) 206-09. There was no evidence that it was unusual for Mr. Avalos to carry large amounts of cash, that he had no other lawful source of income, or that he was generally unable to pay for his expenses or to buy things like used cars. *See RP generally.*

Indeed, Mr. Avalos's situation is more similar to that held inadmissible in *Mitchell*, in which evidence that the accused paid his rent in cash the day after an alleged robbery was not relevant because there was no evidence that doing so was unusual for him. *See Mitchell*, 172 F.3d at 1109-10.

Second, the state did not present any evidence regarding the denominations of bills that had been taken during the burglary. *See RP*

dealing. *Id.* When Jones sought to defend against that evidence by alleging that he had obtained the cash in his possession through some other means, the court held that the probative value of his long-term unemployment outweighed the risk of unfair prejudice. *Id.* In Mr. Avalos's case, on the other hand, Mr. Avalos's purported poverty was the state's only evidence that the cash had been stolen. And Mr. Avalos had never sought to falsely claim that he had on-the-books employment. *Jones* is inapplicable to Mr. Avalos's case.

generally. Accordingly, (unlike the quarters at issue in the *Mitchell* laundromat hypothetical) there was no evidence that Mr. Avalos's cash was in the same denominations as those that had been stolen.³ Instead, the necessary inference in Mr. Avalos's case was that *any* cash in his possession must have been stolen.

The trial court erred by admitting evidence that Mr. Avalos possessed large sums of cash, bought a used car in cash, and did not have any recorded employment. The evidence had almost no probative value but carried a high risk that the jury would unfairly infer that Mr. Avalos was guilty of possession of stolen property because he had a large amount of cash but did not present testimony that it had come from some legitimate source.⁴

Evidentiary error requires reversal unless the evidence is “of minor significance in reference to the overall, overwhelming evidence as a whole.” *State v. Sanford*, 128 Wn. App. 280, 288, 115 P.3d 368 (2005).

³ The state also presented evidence that Mr. Avalos had a rubber band in his pocket on the day of his ultimate arrest and that some of the cash taken during the burglary was held together with rubber bands. RP (12/14/16) 89; RP (12/15/16) 146-47. But there was nothing unique about the rubber band, either. And the state did not present any evidence regarding the frequency with which Mr. Avalos used or carried rubber bands.

⁴ In this sense, the improper admission of the evidence also encouraged the jury to shift the burden of proof onto Mr. Avalos, in violation of his Fourteenth Amendment right to Due Process. U.S. Const. Amend. XIV.

Here, there was no other evidence linking the cash to the burglary. *See RP generally*. Rather, the state's entire theory regarding the cash was that it must have been stolen because Mr. Avalos did not have recorded employment in Washington State.

Additionally, without the inference that the cash had been stolen, the state would likely have been unable to establish that Mr. Avalos possessed stolen property worth \$750 or more, as required to convict him of possession of stolen property in the second degree.⁵

Mr. Avalos was prejudiced by the improper admission of evidence demonstrating that he carried large amounts of cash, bought a used car, and lacked recorded employment. *Sanford*, 128 Wn. App. at 288.

The trial court erred by improperly admitting evidence that encouraged the jury to find Mr. Avalos guilty based on his financial statute alone. *Mitchell*, 172 F.3d at 1108; *Hilton*, 164 Wn. App. 81; ER 401, 402, 403. Mr. Avalos's conviction must be reversed. *Id.*

⁵ Mr. Avalos was also alleged to have possessed a stolen ring, but the owner of that ring did not provide any testimony regarding its value. RP (12/15/16) 141-62. Rather, the only evidence of the ring's value was that there was a ring worth \$4,000 listed on the search warrant. Ex. 36. But the warrant also listed dozens of items that were never recovered. *See* Ex. 36. And there was no listed source of the claim on the warrant that the ring was worth that much. Ex. 36.

Absent evidence leading to the inference that the cash in Mr. Avalos's possession had been stolen, it is unlikely that a jury would have concluded beyond a reasonable doubt that he possessed more than \$750 worth of stolen property.

II. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE THAT MR. AVALOS HAD PRIOR POLICE CONTACT, WHICH RESULTED IN HIS CAR BEING TOWED A FEW DAYS BEFORE THE INCIDENT FOR WHICH HE WAS CHARGED.

Over defense objection, the trial court admitted evidence that Mr. Avalos had police contact, which resulted in his car being towed five days before the alleged offense, in order to introduce to the jury he had been carrying about \$2,000 in cash at that time. RP (12/14/16) 30-32; RP (12/15/16) 170, 175, 177-80.

Without conducting any analysis of the purpose for which the evidence was offered, its probative value, or the risk of unfair prejudice, the trial court ruled that the evidence was admissible simply because Mr. Avalos had no apparent source of legitimate income. RP (12/15/16) 175. The trial court erred.

Under ER 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b) must be read in conjunction with ER 403, which requires that probative value be balanced against the danger of unfair prejudice.⁶ *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

⁶ ER 403 provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The proponent of the evidence carries the burden of establishing that it is offered for a proper purpose. *Slocum*, 183 Wn. App. at 448.

Before admitting misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Slocum*, 183 Wn. App. at 448.

The court must conduct this inquiry on the record. *McCreven*, 170 Wn. App. at 458. Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008). If the evidence is admitted, the court must give a limiting instruction to the jury. *Gunderson*, 181 Wn.2d at 923.

Evidence of uncharged crimes or misconduct can be admissible to prove, *inter alia*, “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

When applying these exceptions, however, courts:

must guard against using ‘motive and intent as magic passwords whose incantation will open wide the courtroom doors to whatever evidence may be offered in their names.’

State v. Arredondo, 188 Wn.2d 244, 259, 394 P.3d 348 (2017) (*quoting State v. Saltarelli*, 98 Wn.2d 358, 364, 655 P.2d 697 (1982)).

Indeed, even if evidence is, technically, relevant under the exceptions to the prohibition on propensity evidence in ER 404(b), it must still be excluded if the risk of undue prejudice outweighs the probative value. *State v. Fuller*, 169 Wn. App. 797, 830, 282 P.3d 126 (2012).

Evidence that an accused person has had prior police contact is inadmissible under ER 404(b) because it may “raise a prejudicial inference of criminal propensity.” *Sanford*, 128 Wn. App. at 286.

In Mr. Avalos’s case, the court failed to conduct the necessary inquiry on the record. *See* RP (12/14/16) 30-32; RP (12/15/16) 170, 175, 177-80. If it had done so, the court would have concluded that the evidence was inadmissible because it did not fall under any of the exceptions to ER 404(b) and, even if it had, the risk of unfair prejudice far outweighed any limited probative value.

The trial court erred by admitting the evidence of Mr. Avalos’s prior police contact. *McCreven*, 170 Wn. App. at 458; *Sanford*, 128 Wn. App. at 286.

Mr. Avalos was prejudiced by the improper admission of evidence of his prior contact with the police. *Sanford*, 128 Wn. App. at 288. First, the evidence encouraged the jury to make an improper propensity inference and to convict Mr. Avalos solely because he appeared to have frequent problems with the police. *Id.* at 286. Second, as outlined above, the evidence that Mr. Avalos had possessed more than \$750 worth of stolen property was far from overwhelming. The evidence that Mr. Avalos had prior police contact and that he had \$2,000 in cash at that time encouraged the jury to convict him simply because he could not explain how he had gotten so much money. But Mr. Avalos had no burden to explain why he was carrying cash on a date completely removed from that on which he was alleged to have committed the charged offense. There is a reasonable probability that the improper admission of the evidence affected the verdict. *Id.*

Even if a court determines that evidence of prior bad acts is admissible under ER 404(b), the court must give an instruction limiting the jury's consideration of the evidence for its proper purpose. *Arredondo*, 188 Wn.2d at 257; *Gunderson*, 181 Wn.2d at 923. The court did not give any limiting instruction regarding the evidence of Mr. Avalos's prior police contact, further exacerbating the prejudice in his case. CP 263-84.

The trial court erred by admitting highly prejudicial evidence, which was inadmissible under ER 403 and ER 404(b). *McCreven*, 170 Wn. App. at 458; *Sanford*, 128 Wn. App. at 286. Mr. Avalos's conviction must be reversed. *Id.*

III. THE TRIAL COURT ERRED BY REFUSING TO GIVE MR. AVALOS'S PROPOSED INSTRUCTION LIMITING THE JURY'S CONSIDERATION OF THE CASH WHEN THE COURT HAD ADMITTED THE EVIDENCE ONLY FOR A LIMITED PURPOSE.

Over Mr. Avalos's objection, the trial court admitted evidence that he had been carrying \$1,000 in cash on the day of his arrest. RP (12/15/16) 233-34. Mr. Avalos pointed out that there was nothing tying the cash in his pocket to the burglary from which it was allegedly stolen. RP (12/15/16) 233. Nonetheless, the trial court ruled that the cash was admissible because it was relevant to Mr. Avalos's knowledge that the items had been stolen. RP (12/15/16) 242.

But, when Mr. Avalos sought an instruction informing the jury that it was not to consider the cash, itself, to be stolen property, the trial court refused to give the instruction. RP (12/15/16) 22; CP 261, 263-84.

The trial court erred by failing to instruct the jury that the cash evidence could only be considered for the purpose for which it was admitted.

When a court admits evidence only for a limited purpose, it must give an instruction admonishing the jury to consider it only for that purpose and prohibiting the jury from making any improper inferences from the evidence, when such an instruction is requested by the party against whom the evidence is admitted. *Mears v. Bethel Sch. Dist. No. 403*, 182 Wn. App. 919, 934, 332 P.3d 1077 (2014).

This rule is mandatory. *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 624, 762 P.2d 1156 (1988) (citing ER 105; 5 K. Tegland, Wash. Prac. § 24, at 64 (1982)).

Instructional error is presumed to be prejudicial “unless is affirmatively appears to be harmless.” *State v. Stein*, 144 Wn.2d 236, 246, 27 P.3d 184 (2001).

The court’s refusal to give Mr. Avalos’s proposed limiting instruction likely affected the outcome of his trial. Absent the instruction, the prosecutor was permitted to encourage the jury to consider the cash to be stolen property during closing argument. RP (12/16/16) 289. If the jury had not considered the cash to be stolen, it is unlikely that the jury could have concluded that Mr. Avalos possessed more than \$750 worth of stolen property.⁷

⁷ See note 5, above.

The trial court erred by refusing to give Mr. Avalos's proposed limiting instruction. *Mears*, 182 Wn. App. at 934; *Sturgeon*, 52 Wn. App. at 624. Mr. Avalos's conviction must be reversed. *Id.*

IV. THE PROSECUTOR COMMITTED MISCONDUCT BY MAKING AN ARGUMENT DESIGNED TO SHIFT THE BURDEN OF PROOF ONTO MR. AVALOS.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Even absent objection, reversal is required when misconduct is "so flagrant and ill intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the

office.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

An accused person has no duty to present evidence at trial. *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996) (citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). The state bears the burden of proving each element of its case beyond a reasonable doubt. *Id.*

Accordingly, a prosecutor commits misconduct by making arguments designed to shift the burden of proof onto the accused to “disprove the state’s case.” *Id.*

In *Fleming*, for example, the prosecutor improperly shifted the burden of proof by arguing that the jury should find the accused guilty because there was no evidence that the alleged victim had fabricated the events or was confused about what had happened. *Id.* at 214.

Similarly, at Mr. Avalos’s trial, the prosecutor argued that the jury should convict because there was no evidence that Mr. Avalos had obtained the cash in his pocket or the money he had used to buy the used car by lawful means. RP (2/16/16) 289. Any evidence of that nature, however, would have had to be presented by the defense. As such, the prosecutor’s argument had the effect of reducing the state’s burden to one of making only a *prima facie* case that Mr. Avalos possessed money and

had no recorded employment in Washington State and then shifting the burden onto the defense to explain where the money had come from. The prosecutor's argument was improper.

There is a substantial likelihood that the prosecutor's burden-shifting argument affected the verdict in Mr. Avalos's case. *Glasmann*, 175 Wn.2d at 704. First, as pointed out by the *Fleming* court: "trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." *Fleming*, 83 Wn. App. at 215.

Second, as outlined above, the evidence against Mr. Avalos was far from overwhelming. The prosecutor's improper argument encouraged the jury to convict because Mr. Avalos had not presented sufficient evidence, rather than because the state had met its burden of proof. Mr. Avalos was prejudiced by the improper burden-shifting argument. *Glasmann*, 175 Wn.2d at 704.

Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707. Here, the prosecutor had access to longstanding case law prohibiting arguments

that shift the burden of proof onto the accused. *See e.g. Fleming*, 83 Wn. App. at 215.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct at Mr. Avalos's trial by making an argument designed to shift the burden of proof. *Id.* Mr. Avalos's conviction must be reversed. *Id.*

V. THE CUMULATIVE EFFECT OF THE ERRORS AT MR. AVALOS'S TRIAL REQUIRE REVERSAL OF HIS CONVICTION.

Under the doctrine of cumulative error, an appellate court may reverse a conviction when "the combined effect of errors during trial effectively denied the defendant [his/]her right to a fair trial even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010).

At Mr. Avalos's trial, the court erroneously admitted extensive evidence that encouraged the jury to convict Mr. Avalos because of his financial situation and to make an improper inference of criminal propensity. RP (12/14/16) 12-16, 30-32, 75, 79; RP (12/15/16) 123-34, 170, 175, 177-80, 206-09, 233-34. Some of that evidence was actually only admitted for a limited purpose, but the court nonetheless refused to give Mr. Avalos's proposed limiting instruction, despite a rule requiring such an instruction. RP (12/15/16) 22, 242. The prosecutor also made an

improper argument, encouraging the jury to shift the burden of proof onto Mr. Avalos. RP (2/16/16) 289.

All of these errors worked in combination to create a significant likelihood that the jury convict Mr. Avalos based on factors other than the properly-admitted evidence against him. The cumulative effect of the errors at Mr. Avalos's trial deprived him of a fair trial and requires reversal of his conviction for possession of stolen property. *Id.*

VI. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY BY ORDERING MR. AVALOS TO PAY RESTITUTION FOR POSSESSING MONEY THAT WAS NEVER SHOWN TO BE STOLEN AND WHICH WAS NOT CAUSALLY CONNECTED TO THE OFFENSE OF CONVICTION.

Mr. Avalos was convicted of possessing \$1,000 in stolen cash and/or some stolen jewelry on the date of his ultimate arrest.⁸ The police recovered all of the allegedly stolen property related to that incident. RP (1/30/17) 3-4.

Nonetheless, the sentencing court ordered Mr. Avalos to pay \$1,000 in restitution because the state presented evidence that he had \$2,000 in cash five days before the incident for which he was charged. RP (1/30/17) 3-4; CP 383-84. The court reasoned that the subsequent \$1,000 (which was seized) must have been a subset of the original \$2,000 and

⁸ It is not actually clear whether the jury concluded that Mr. Avalos had possessed only stolen jewelry, only stolen cash, or both.

ordered Mr. Avalos to pay the difference in those two amounts. RP (1/30/17) 3-4.

But the state did not present any evidence that the \$2,000 Mr. Avalos possessed on that first date was stolen. Mr. Avalos was not in possession of any other stolen property on that date. He was not charged with possession of stolen property on that date. *See* CP 17-19. The state's theory at trial was only that he was guilty of possessing stolen cash and jewelry on the date of his ultimate arrest. RP (12/16/16) 285-90.

The trial court exceeded its statutory authority by ordering Mr. Avalos to pay restitution for money that was not proved to be stolen and which was not causally connected to the offense of conviction.⁹

The court's authority to impose restitution is derived from statute; a court has no inherent authority to impose restitution. *State v. McCarthy*, 178 Wn. App. 290, 294, 313 P.3d 1247 (2013) (*citing State v. Gray*, 174 Wn.2d 920, 924, 280 P.3d 1110 (2012); *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991)).

⁹ Legal issues related to a sentencing court's authority to impose restitution are reviewed *de novo*. *State v. Osborne*, 140 Wn. App. 38, 41, 163 P.3d 799 (2007). A sentencing court's factual findings related to restitution are reviewed for substantial evidence. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008) (Griffith I).

The legislature has permitted a sentencing court to impose restitution “based on easily ascertainable damages for injury to or loss of property” pursuant to a criminal conviction. RCW 9.94A.753(3).

A sentencing court exceeds its statutory authority by ordering restitution for a loss that is not causally related to the offense for which the accused is actually convicted. *State v. Woods*, 90 Wn. App. 904, 907, 953 P.2d 834 (1998). Losses are causally connected if “but for the charged crime, the victim would not have incurred the loss.” *Griffith*, 164 Wn.2d at 966.

Restitution cannot be imposed based on a “general scheme” or “acts ‘connected with’ the crime charged,” where those acts are not actually part of the charged offense. *State v. Oakley*, 158 Wn. App. 544, 552, 242 P.3d 886 (2010); *Osborne*, 140 Wn. App. at 42.

In *Woods*, for example, the sentencing court exceeded its authority by ordering the offender to pay restitution for items that were located in a vehicle when it was stolen in August when she was convicted only of possessing the truck in September. *Woods*, 90 Wn. App. at 909-10. This was because “it [could] not be said that ‘but for’ Woods’ possession of the stolen vehicle in September, the owner would not have lost the personal property located in the vehicle when it was stolen in August.” *Id.*; *See also Griffith*, 164 Wn.2d at 967 (*quoting State v. Griffith*, 136 Wn. App.

885, 894, 151 P.3d 230 (2007) (Griffith II) (Schultheis, J., dissenting) (“Culpability for possession of stolen property does not necessarily include culpability for the stealing of the property. The actual thief is guilty of a different crime” (internal citation omitted)).

Similarly, in Mr. Avalos’s case, the offense of conviction was possession of stolen property on the date of ultimate arrest. CP 18; *See RP generally*. Mr. Avalos was not convicted of actually stealing the much larger sum of money that was taken during the burglary. Any conclusion that the \$2,000 he possessed five days earlier had been stolen was based only on speculation and conjecture. It cannot be said that “but for” the possession of stolen property on the date of his arrest, the burglary victims would not have lost an additional \$1,000. *Griffith*, 164 Wn.2d at 966.

The sentencing court exceeded its statutory authority by ordering Mr. Avalos to pay restitution that was not causally connected to the offense of his conviction. *Id.*; *Woods*, 90 Wn. App. at 909-10; RCW 9.94A.753(3). The court’s restitution order must be vacated. *Id.*

VII. THE LANGUAGE CHARGING MR. AVALOS WITH POSSESSION OF STOLEN PROPERTY WAS CONSTITUTIONALLY DEFICIENT.

The Information in Mr. Avalos’s case charged him with possession of un-defined “stolen property,” allegedly belonging to some un-named person. CP 18.

Because it did not allege *what* stolen property Mr. Avalos was alleged to have possessed, the Information did not provide him adequate notice of the charges against him. The charging language was constitutionally deficient.

The Sixth Amendment right “to be informed of the nature and cause of the accusation” and the federal guarantee of due process impose certain requirements on charging documents. U.S. Const. Amends. VI, XIV.¹⁰ A charging document “is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy.” *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005).¹¹ The charge must include more than “the elements of the offense intended to be charged.” *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted).¹²

¹⁰ Wash. Const. art. I, §§ 3 and 22 impose similar requirements.

¹¹ The Fifth Amendment, applicable through the Fourteenth, protects the accused person against double jeopardy. U.S. Const. Amends. V, XIV.

¹² Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied*, 176 Wn.2d 1007, 297 P.3d 68 (2013). Such challenges may be raised for the first time on appeal. *Id.*

Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Rivas*, 168 Wn. App. at 887. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.* If the Information is deficient, prejudice is presumed. *Id.*, at 888. The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.*, at 893.

Any offense charged in the language of the statute “must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense.” *Id.* (citations and internal quotation marks omitted). The charge must also be specific enough to allow the defendant to plead the former acquittal or conviction “in case any other proceedings are taken against him for a similar offense.” *Id.*

Any “critical facts must be found within the four corners of the charging document.” *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004).

In cases involving offenses related to theft, the Information must “clearly” charge the accused person with a crime relating to “specifically described property.” *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002). When the charging document includes “not a single word to indicate the nature, character, or value of the property,” the charge is “too vague and indefinite upon which to deprive one of his [or her] liberty.” *Edwards v. United States*, 266 F. 848, 851 (4th Cir. 1920).

In this case, the Information passes only the first of these three requirements: it charges in the language of the statutes, and thus “contains the elements of the offense intended to be charged.” *Russell*, 369 U.S. at 763-64. It fails the other two requirements because it omits critical facts. In the absence of critical facts, the Information does not provide adequate

notice of the charges, nor does it provide any protection against double jeopardy. *Id.*; *Valentine*, 395 F.3d at 631.

Here, the Information does not provide any allegations regarding the nature or character of the stolen items Mr. Avalos is supposed to have possessed. CP 17-19. Because of this, the allegations are “too vague and indefinite upon which to deprive [Mr. Avalos] of his liberty.” *Id.* The Information provides neither notice¹³ nor protection against double jeopardy. *Russell*, 369 U.S. at 763-64; *Valentine*, 395 F.3d at 631. The critical facts for Mr. Avalos charge cannot be found by any fair construction of the charging document. *Rivas*, 168 Wn. App. at 887.

The Information is constitutionally deficient. Mr. Avalos’s conviction must be reversed and the charge dismissed without prejudice. *Rivas*, 168 Wn. App. at 893.

VIII. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE ANY REQUEST TO IMPOSE APPELLATE COSTS UPON MR. AVALOS BECAUSE HE IS INDIGENT.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the

¹³ Indeed, the prosecution’s theory that Mr. Avalos had committed theft of money from the pawnshop by selling items that were later seized by the police was far from intuitive. It is unlikely that a seasoned attorney (far less an accused person) would be able to determine what he was alleged to have stolen based on the bald assertion in the charging document even if s/he was otherwise familiar with all of the allegations in the case.

Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016).¹⁴

Appellate costs are “indisputably” discretionary in nature. *Sinclair*, 192 Wn. App. at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court waived non-mandatory LFOs in Mr. Avalos’s case. RP (01/10/17) 101; CP 314-15. The trial court also found Mr. Avalos indigent at the end of the proceedings in superior court. CP 346-48.

That status is unlikely to change. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

Additionally, the newly amended RAP 14.2 specifies that the trial court’s finding of indigency stands unless the state presents evidence that the accused’s financial circumstances have changed:

¹⁴ Though the recent amendments to RAP 14.2 arguably negate the requirement for an indigent appellant to raise this issue in his/her Opening Brief, Mr. Avalos raises it, nonetheless, out of an abundance of caution. See RAP 14.2 (as amended by 2017 WASHINGTON COURT ORDER 0001).

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

RAP 14.2 (*as amended by 2017 WASHINGTON COURT ORDER 0001*).

The state is unable to provide any evidence that Mr. Avalos's financial situation has improved since he was found indigent by the trial court.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested. RAP 14.2; *Blazina*, 182 Wn.2d 827.

CONCLUSION

The trial court erred by admitting extensive evidence that was inadmissible under ER 401, 402, 403, and 404(b). The trial court erred by refusing to give a limiting instruction even after it had admitted certain evidence only for a limited purpose. The prosecutor committed misconduct by making an argument designed to shift the burden of proof onto Mr. Avalos. The cumulative effect of these errors requires reversal of Mr. Avalos's conviction because he was deprived of a fair trial.

The language charging Mr. Avalos with possession of stolen property was constitutionally deficient because it failed to specify any of the critical facts for the charge.

Mr. Avalos's conviction must be reversed.

In the alternative, the sentencing court exceeded its statutory authority by ordering Mr. Avalos to pay restitution for a loss that was not causally connected to the offense of his conviction. The court's restitution order must be vacated.

If the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Avalos because he is indigent.

Respectfully submitted on January 2, 2018,



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

CERTIFICATE OF SERVICE

I certify that on today's date:

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

Joshua Avalos
213 3rd Avenue NE
Quincy, WA 98848

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

Grant County Prosecuting Attorney
gdano@grantcountywa.gov
kburns@grantcountywa.gov

Lise Ellner
liseellnerlaw@comcast.net

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

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

Signed at Seattle, Washington on January 2, 2018.



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

LAW OFFICE OF SKYLAR BRETT

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