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NO. 35410-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

CURTIS ANDERSON,

Appellant.

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

The Honorable Timothy B. Fennessy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting appellant's statements made during custodial interrogation when the State failed to prove he was fully and correctly advised of his constitutional rights as required by Miranda v. Arizona.¹

2. The court erred in failing to enter written findings of fact and conclusions of law after the CrR 3.5 hearing.

3. The court erred in finding appellant was advised of his constitutional rights under Miranda. RP 74-75.

4. The court erred in finding appellant voluntarily waived his Miranda rights. RP 75.

5. The court erred in entering judgment for felony violation of a no-contact order when the underlying order was unconstitutionally vague.

6. The prosecutor committed misconduct in closing argument that violated appellant's right to a fair trial by misstating the law regarding the elements of the offense and the presumption of innocence.

7. Counsel was constitutionally ineffective in failing to object to the prosecutor's misconduct.

8. Cumulative error deprived appellant of a fair trial.

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

9. The court erred in penalizing appellant's exercise of his constitutional right to a jury trial by denying his request for a drug offender sentencing alternative (DOSAs).

10. The court erred in failing to provide appellant the opportunity for allocution until after it had pronounced the sentence.

Issues Pertaining to Assignments of Error

1. When the State seeks to admit statements made by a defendant during custodial interrogation, it bears the burden to prove by a preponderance of the evidence that the statements were made after a knowing, intelligent, and voluntary waiver of the rights to silence and to counsel. The officer who interrogated appellant testified he "read him his rights" but could not remember whether he did so from memory or read from his card. He offered no further testimony as to the content of the rights he read. Appellant testified he was not advised of his constitutional rights. Did the court err in admitting the statements absent proof appellant was advised of his rights as required under Miranda v. Arizona?

2. CrR 3.5 (c) requires written findings of fact and conclusions of law after a hearing on the voluntariness of a defendant's statement. No findings or conclusions were filed in this case. Should this case be remanded for entry of the required findings and conclusions?

3. Appellant was convicted of violating a no-contact order prohibiting him from coming within two blocks of his mother's house. When blocks can be of varying lengths, and partial blocks as well as two-directional movement is involved, was the order unconstitutionally vague in violation of due process?

4. Prosecutors may not misstate the law during closing argument; to do so is misconduct that may violate the defendant's right to a fair trial. Here, the prosecutor undermined the presumption of innocence by telling the jury, "you already know what that conclusion is." He also relieved the State of its burden to prove appellant knowingly violated the no-contact order when he argued any intentional act is knowing and "whatever we do, we do intentionally." Did prosecutorial misconduct in closing argument deprive appellant of a fair trial?

5. Every accused person is entitled to effective assistance of counsel for his defense. Was appellant's right to counsel violated when his attorney failed to object to the prosecutor's argument that undermined the presumption of innocence and relieved the State of its burden to prove the mental state required for the offense?

6. The compounded effect of multiple trial errors can result in a violation of the right to a fair trial. Did the combination of errors in this case amount to cumulative error that deprived appellant of a fair trial?

7. A sentencing judge must exercise discretion within the bounds of the law and the constitution. The court denied appellant's request for a prison-based drug offender sentencing alternative on the grounds that he could have pleaded guilty and made such a request without going to trial. Did the court violate due process by penalizing appellant for exercising his constitutional right to a jury trial?

8. The convicted person has a statutory right to be heard via allocution before the court pronounces its sentence. Did the court err when it failed to offer appellant the right to allocution until after the court had already pronounced its sentence?

B. STATEMENT OF THE CASE

1. Anderson was arrested for being within two blocks of his mother's house.

The Spokane County prosecutor charged appellant Curtis Anderson with one count of violation of a no-contact order, committed against a family or household member. CP 9. At the time of trial, Anderson was 29 years old and the family member in question was his mother, Kary Curtis. RP 78. He told police he went to his mother's house because he was cold and hungry. RP 138.

Police were alerted by a neighbor, Robert Delp, who saw someone looking into parked cars on the street. RP 92-93. He testified he confronted

the person, who pulled a knife and then left. RP 93. The person he saw had a bandanna across his face, wore dark jeans, a dark jacket, and a black baseball cap with an orange symbol on it. RP 94. Police responded to Delp's 7:00 a.m. call but found no one in the vicinity. RP 104-05.

Approximately an hour and a half later, police received another call reporting a person rummaging through a car a couple of blocks away. RP 105. Officer Trevor Winters saw Anderson near a car and noticed his clothing matched Delp's description. RP 106-07.

Winters asked Anderson to stop and talk. RP 107. Anderson agreed. RP 108. Winters asked Anderson to sit on a nearby porch, and, after Officer Nicholas Spolski arrived as backup, they relieved Anderson of his knife. RP 107-08. When asked, Anderson gave his true name and date of birth. RP 108. Winters checked records and learned a court order prohibited Anderson from being within two blocks of his mother's house, which was approximately two to three blocks from where they stood. RP 108-11.

Kary Curtis identified exhibit 1, the no-contact order, prohibiting her son from coming within two blocks of her home. RP 77-78. She also identified Anderson as her son, the person named in the order. RP 78. The court also admitted Exhibit 2, a judgment and sentence showing Anderson had two prior convictions for violating a court order. RP 115-16; Ex. 2.

Winters arrested Anderson and claimed he read him his rights. RP 111-12. By contrast, Anderson testified Winters never read him his rights. RP 66. According to Winters, Anderson then denied being at his mother's home, but admitted to a verbal altercation as he walked past a nearby house. RP 112.

Spolski then responded to a third call to police, this one from David Curtis, Anderson's mother's husband. RP 136-37. Curtis had awoken to find the bathroom window open, with a bucket placed underneath it outside and footprints in the snow. RP 84-85. Neither Curtis nor his wife had seen anyone that morning. RP 80, 85.

2. Witness Delp could not positively identify Anderson.

Winters then brought Anderson to the street in front of Delp's home for identification. RP 113. He warned Delp this might not be the person he had seen and it was just as important to exonerate someone who was not involved. RP 113-14. Delp was either on his porch or in his front yard, about a half a block away from Anderson. RP 114, 142. Winters spoke with Delp, while Spolski had Anderson step out of the patrol car. RP 114, 138. Anderson was in handcuffs. RP 125.

There was some dispute as to the nature of Delp's identification. Winters claimed Delp positively identified Anderson as the person he had seen. RP 114. Delp, however, testified he never saw the person's face, which

was covered by a bandanna. 94-95. Delp testified he told Winters he could not be sure about the face. RP 95. He could only say the dark clothes and backpack matched what he had seen. RP 95. When Anderson was presented to Delp for identification, Anderson did not have a bandanna, a knife, or a sheath. RP 99-100. The court denied Anderson's pre-trial motion to exclude the identification as impermissibly suggestive. RP 11-12.

While Spolski stood with Anderson for the show-up, he confronted Anderson with the evidence that someone had been at his mother's home. RP 138. In response, Anderson said that he was cold and hungry. RP 148. Spolski asked if that was why he went to his mother's house, and Anderson said, "Yeah." RP 148.

3. The court admitted Anderson's statements to police.

After a CrR 3.5 hearing, the court admitted these statements, finding Anderson was in custody but voluntarily waived his Miranda rights after advisement. RP 73-75. At the hearing, Winters testified he could not recall whether he read Anderson the rights from his Department-issued card or whether he recited them from memory. RP 58.

Counsel pointed out on cross examination that Winters crossed out the phrase "constitutional rights" on the top of his card and wrote in "Miranda rights." RP 59. Winters testified Anderson never saw the card and Winters did not explain the difference to him. RP 59. Defense counsel

argued Anderson's post-Miranda statements to Spolski were inadmissible due to the alteration of the card. RP 71-72.

In its oral ruling, the court found Winters was not certain whether he read the rights or recited them from memory "and there was no questioning about that." RP 74. The court concluded, "There was no question that this court is aware of that those rights were incorrectly or improperly provided." RP 74. The court ruled Anderson's statements were all admissible. RP 74-75. No written findings or conclusions have been filed.

4. Anderson argued he was not knowingly within two blocks of his mother's house.

The disputed factual issues at trial were whether Delp's identification was conclusive and whether the location where police found Anderson was within two-blocks of his mother's house. RP 166, 168-69, 174. Winters testified the location was within two blocks. RP 127. David Curtis, however, testified one would have to travel two blocks north and one block east to arrive at the location, so the distance was three blocks. RP 89-90. No map exhibits were admitted.

The State argued Anderson knowingly violated the provisions of the no contact order. RP 164. The prosecutor pointed the jury to the instruction that knowingly performing an act is also established if the person performs the act intentionally. RP 164. The prosecutor then told the jury, "whatever

we do, we do intentionally.” RP 164. The prosecutor offered, as an example, the idea that jurors intentionally appeared in response to their jury summons. RP 164.

Defense counsel argued there was reasonable doubt as to whether Anderson was within two-blocks of his mother’s house and even if he were, whether he knew he was. RP 171-72. In rebuttal, the prosecutor argued that the facts lead to only one conclusion, and told the jury, “You already know what that conclusion is.” RP 174. The jury found Anderson guilty and found the offense was committed against a family member. RP 177; CP 30-31.

5. The court denied Anderson’s request for a drug offender sentencing alternative.

At sentencing, Anderson agreed his offender score was nine. RP 182. The standard sentencing range was, therefore, above the statutory maximum for a class C felony. RCW 9.94A.510; RCW 13.34.515. Anderson requested a prison-based drug offender sentencing alternative (DOSA), arguing his criminal issues stemmed from untreated addiction. RP 182. His mother and sister spoke on his behalf, requesting treatment rather than a long prison sentence. RP 185. His mother also told the court she regretted obtaining the no-contact order. RP 185.

The court denied the request for a DOSA, explaining, “Mr. Anderson is here because he’s been incarcerated. And I don’t have any other indication

or rationale of his being here other than that he is incarcerated.” RP 189. The court then essentially opined that if Anderson really wanted treatment, he should have pleaded guilty. RP 189-90. Responding to an argument by defense counsel, the court declared,

I agree, Ms. Foley, that it would be highly unlikely for someone to indicate, hey, I’ve got a drug problem when they’re vehicle prowling, it would not be at all unusual for that person to avoid trial by saying, look, I was there. I did the crime. I was within the two-block radius. You don’t have to take me to trial and prove that. I’ve got a problem. I was home. I was hungry. I was cold. I needed to go home, and I needed help, and that’s what I need. And that’s not what Mr. Anderson did.

RP 189-90. The court announced it would impose the full 60 months. RP 190. After this declaration, the court asked if Anderson had anything to say before the sentence was finalized. RP 190. Anderson declined. RP 190.

C. ARGUMENT

1. ANDERSON’S STATEMENTS TO SPOLSKI SHOULD HAVE BEEN SUPPRESSED BECAUSE THE STATE FAILED TO PROVE ANDERSON WAS FULLY AND ACCURATELY ADVISED OF HIS MIRANDA RIGHTS.

The State failed to prove Anderson was advised of his constitutional rights before custodial interrogation. “Under Miranda, a suspect in custody “must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so

desires.” State v. Brown, 132 Wn.2d 529, 582-83, 940 P.2d 546 (1997). It is the State’s burden to prove that the person being questioned was fully advised of each of these rights. Miranda, 384 U.S. at 475; State v. Haack, 88 Wn. App. 423, 435-36, 958 P.2d 1001 (1997).

Here, the requirements of Miranda were triggered when Winters placed Anderson under arrest and Spolski questioned him during the identification. Anderson’s statement to Officer Spolski that he went to his mother’s house because he was cold and hungry should have been excluded because the State failed to show he was fully advised of his rights.

- a. Miranda requires suppression of statements made during custodial interrogation unless the State proves the person was fully advised of his or her rights.

To protect against the coerced self-incrimination prohibited by the Fifth Amendment,² Miranda requires that, before being subjected to custodial interrogation, a person must be advised of the right to silence, the right to counsel, and the right to appointed counsel in case the person cannot afford counsel. 384 U.S. at 478-79. The mere decision to speak to police is not a waiver of these rights; waiver will be found only if, after being fully and accurately advised of these rights, the person intelligently and

² The Fifth Amendment provides in relevant part, “No person . . . shall be compelled in any criminal case to be a witness against himself.” The protections of the Fifth Amendment apply to the states via the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). Article I, section 9 of Washington’s constitution likewise states: “[n]o person shall be compelled in any criminal case to give evidence against himself.” The state and federal provisions are interpreted as providing the same protection. State v. Earls, 116 Wn.2d 364, 375-75, 805 P.2d 211 (1991).

understandably waives them. Id. at 475. Statements made without the protections Miranda requires are generally inadmissible at trial.³ Id. at 479.

The purpose of the advice of rights is to protect against the danger of coercion that is inherent in custodial police interrogation. Id. at 477-78; Berkemer v. McCarty, 468 U.S. 420, 428, 104 S. Ct. 3138, 3144, 82 L. Ed. 2d 317 (1984). The need for Miranda warnings is triggered by the combination of two circumstances: first, that the suspect is in police custody and second, that he or she is subjected to police interrogation. Id. The legal questions of whether the circumstances amounted to custodial interrogation and whether the Miranda warnings were adequate are both questions that courts review de novo.⁴ In re Pers. Restraint of Cross, 180 Wn.2d 664, 681, 327 P.3d 660 (2014); State v. Lorenz, 152 Wn.2d 22, 30, 93 P.3d 133 (2004); State v. Hopkins, 134 Wn. App. 780, 785, 142 P.3d 1104 (2006).

b. Miranda warnings were required because Anderson was subjected to custodial interrogation.

Anderson was in custody for purposes of Miranda when he was formally arrested after police learned of the no-contact order. RP 41. A

³ The warnings are a pre-requisite for the admissibility of statements made during custodial interrogation unless another, equally protective, process is implemented, Miranda, 384 U.S. at 490. Voluntary statements made without Miranda warnings may, nonetheless, be used for impeachment purposes only. Harris v. New York, 401 U.S. 222, 224, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971).

⁴ Underlying factual findings are reviewed for substantial evidence. State v. Solomon, 114 Wn. App. 781, 60 P.3d 1215 (2002). Here, the trial court entered no written factual findings.

suspect is in custody for purposes of Miranda when his freedom of movement is curtailed to a degree equivalent to a formal arrest. California v. Beheler, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983); State v. Harris, 106 Wn.2d 784, 725 P.2d 975 (1986) (citing Berkemer, 468 U.S. 420). Here, it is undisputed that there was, in fact, a formal arrest. RP 41. Therefore, Anderson was in custody.

He was then brought, handcuffed, in a patrol car, to Delp's home for identification. RP 43-44. During the identification, he was subjected to interrogation. Interrogation, under Miranda, refers to any police questioning or conduct that is reasonably likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291, 301-02, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). Anderson was subjected to specific police questioning which was designed to, and did in fact, elicit an incriminating response.

First, Anderson was brought to be identified by a witness. IRP 43-44. Identification by an alleged witness is one of the interrogation tactics specifically mentioned in Miranda and Innis. Innis, 446 U.S. at 299 (discussing Miranda, 384 U.S. at 453). Then, Spolski confronted him with evidence that he had been at his mother's home. RP 138. Confronting someone with evidence of guilt is also a form of interrogation expressly mentioned in Miranda. 384 U.S. at 450 (noting police psychological ploy to posit the guilt of the subject as a fact). In response, Anderson told Spolski he

was cold and hungry. RP 148. Spolski followed up with express questioning, asking if that was why Anderson went to his mother's house. RP 148.

This was custodial interrogation. Anderson's responses should have been excluded because the state failed to establish that he was properly advised of his constitutional rights as required by Miranda.

- c. The State failed to prove Anderson was fully advised of his constitutional rights before speaking.

The inherently coercive nature of custodial interrogation places a heavy burden on the State to show the accused person's decision to speak was "an intentional relinquishment or abandonment of a known right or privilege." State v. Jones, 19 Wn. App. 850, 853, 578 P.2d 71 (1978) (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). To that end, the State bears the burden to "establish by a preponderance of the evidence that the defendant, after being fully advised of his rights, knowingly and intelligently waived them." Haack, 88 Wn. App. at 435-36 (emphasis added). The State failed to meet that burden here.

Without advice regarding the Miranda rights, an accused person "cannot be presumed to know" them. State v. Sargent, 111 Wn.2d 641, 655, 762 P.2d 1127 (1988). Under Miranda, "no amount of circumstantial evidence that the person may have been aware of this right will suffice." 384

U.S. at 471-72. The only way to establish whether the accused knew of the rights is to establish that he was specifically advised of them. Id.

The evidence in this case fails to establish whether Anderson was specifically advised of his rights to silence and to counsel because it does not establish what officer Winters⁵ told him beyond the mention of “Miranda rights.” Winters, who arrested Anderson, testified at the CrR 3.5 hearing, “I advised him of his Miranda rights, which he stated he understood. And then he waived his rights and was willing to talk to me.” RP 40. He testified that, after learning of the no-contact order, he “personally read him his rights.” RP 58. Winters could not recall whether he read the rights off of his Department-issued card or instead recited them from memory. RP 58. The card was apparently present at the hearing, but was not admitted as an exhibit. RP 58-59. Even if it had been admitted, the card would still fail to show whether Anderson was properly advised. Winters did not know if he used the card and Anderson never saw it. RP 58-59. There was no testimony or evidence establishing what, precisely, Winters told Anderson about his constitutional rights.

There was no factual support for a finding that Anderson was properly advised of all his Miranda rights before he was arrested and

⁵ Spolski, the officer who interrogated Anderson during the show-up identification, did not testify at the CrR 3.5 hearing, and during his trial testimony he made no mention of advising Anderson of any constitutional rights.

questioned. Additionally, no written finding was made. In its oral ruling, the court appeared to rely on the absence of evidence to admit the statements, concluding “There is no question that this court is aware of that those rights were incorrectly or improperly provided.” RP 74. The court erred in placing the burden on Anderson to show that the warnings were incorrectly or improperly administered. Miranda, 384 U.S. at 475; Haack, 88 Wn. App. at 435-36.

Here, the State failed to provide any evidence whatsoever of what, specifically, Anderson was told. The absence of evidence cannot sustain a finding that Anderson was properly advised of his constitutional rights. On the contrary, courts must indulge every reasonable presumption against a waiver. Miranda, 384 U.S. at 475; Johnson v. Zerbst, 304 U.S. at 464.

The warnings need not follow the exact language of Miranda, but the reviewing court must be able to determine from the record that the warnings reasonably and effectively conveyed all of the necessary rights. Hopkins, 134 Wn. App. at 785 (citing Brown, 132 Wn.2d at 582). The record must show that the person was advised of each distinct right. See, e.g., State v. Erho, 77 Wn.2d 553, 560-61, 463 P.2d 779 1970 (record in adequate where officer did not testify he told defendant his statements could be used against him or that he had a right to an attorney); State v. Tetzlaff, 75 Wn.2d 649,

652, 453 P.2d 638 (1969) (warnings inadequate when officer did not tell suspect of right to free legal counsel at time of interrogation).

For example, in Erho, the arresting officer testified he told Erho he had the right to remain silent, the right to see an attorney before saying anything, and the right to have an attorney at that time. 77 Wn.2d at 556. There was no further elaboration on the content of the warnings. Id. Specifically, the officer did not testify about whether he advised Erho that anything he said could be used against him or that, if indigent, he had a right to court-appointed counsel. Id. at 560. The court concluded the record was inadequate to show Erho received full Miranda warnings. Id. at 560.

The State similarly failed in its burden here. The mere mention of “Miranda rights” with no further explanation of what, precisely, Anderson was told, leaves the court with a silent record on the crucial question of whether he was fully and adequately informed of his constitutional rights. His subsequent statements to Spolski should have been suppressed.

- d. The error in admitting Anderson’s statements requires reversal.

Violation of the dictates of Miranda is constitutional error. State v. Spotted Elk, 109 Wn. App. 253, 261, 34 P.3d 906 (2001). Prejudice is presumed and reversal is required unless the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. State v.

Rhoden, 189 Wn. App. 193, 202-03, 356 P.3d 242 (2015) (citing State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). The State cannot prove harmlessness here. As a result of this error, the jury heard Anderson's confession that he had gone to his mother's house because he was cold and hungry. A confession is perhaps the most damning evidence imaginable. "Admission of a confession 'will seldom be harmless.'" United States v. Barnes, 713 F.3d 1200, 1207 (9th Cir. 2013) (quoting United States v. Williams, 435 F.3d 1148, 1162 (9th Cir. 2006)).

The State's other witnesses could not conclusively place Anderson within two-blocks of his mother's house in violation of the no-contact order. Delp saw someone only one half of one block from Anderson's mother's house, but could only identify the clothing. RP 94-95. Delp could not positively identify Anderson as the man he saw. RP 94-95. Winters' testimony also does not conclusively establish guilt because it was strongly contested whether the spot where Winters encountered Anderson was within the prohibited two blocks of Anderson's mother's house. RP 89-90 (David Curtis' testimony that Nora and Walnut is three blocks from the protected house). Under these circumstances, Anderson's apparent confession to going to his mother's house because he was cold and hungry was likely to be a decisive factor. This Court should reverse.

This error was specifically preserved for review because counsel argued for exclusion of the post-Miranda statements. RP 72. The purpose of requiring contemporaneous objection is to permit the trial court to rule on an issue at a time when the error can still be corrected. State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988). When a closely related issue is raised, courts may exercise discretion to consider newly articulated theories on appeal. Lunsford v. Saberhagen Holdings, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007), aff'd, 166 Wn.2d 264 (2007). The theory presented in this brief is, at very least, closely related to the issues litigated at the CrR 3.5 hearing. Moreover, the issue was sufficiently raised that the trial court issued a ruling on the adequacy of the warnings, namely that Anderson had failed to prove they were deficient. RP 74.

Alternatively, the violation of Miranda also constitutes manifest constitutional error that may be raised for the first time on appellate review. Constitutional error is manifest when the record is sufficient to show the necessary facts to adjudicate the issue. State v. Malone, 193 Wn. App. 762, 767, 376 P.3d 443 (2016) (citing State v. Koss, 181 Wn.2d 493, 503, 334 P.3d 1042 (2014)). Additionally, to be manifest, the error must have caused practical and identifiable consequences. State v. Harris, 154 Wn. App. 87, 94, 224 P.3d 830 (2010). Here, the error had the practical and identifiable consequence of Anderson's alleged confession being used as evidence

against him at his trial, in violation of Miranda. Regardless of whether this Court finds the error preserved, it should be addressed in this appeal.

2. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CRR 3.

Before trial, the court held a hearing under CrR 3.5 to determine admissibility of Anderson's statements. RP 36-76. The court, however, failed to enter written findings or conclusions as required by CrR 3.5. That rule provides in part:

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

Under the plain language of CrR 3.5, written findings of fact and conclusions of law are required. Here, the court followed CrR 3.5's mandate to hold a hearing on the admissibility of the statements and rendered an oral decision, but failed to enter the required written findings and conclusions.

The oral decision is "no more than a verbal expression of [the court's] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963). Consequently, the court's decision is not binding "unless it is formally incorporated into findings of fact, conclusions of law, and judgment." State

v. Hescoc, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (quoting State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)).

The purpose of written findings is to allow the reviewing court to determine the basis upon which the case was decided and to review the issues raised on appeal. State v. Pena, 65 Wn. App. 711, 715, 829 P.2d 256 (1992), overruled on other grounds, State v. Alvarez, 128 Wn.2d 1, 18-19, 904 P.2d 754 (1995)). Meaningful appellate review requires findings of fact “that show an understanding of the conflicting contentions and evidence, and a resolution of the material issues of fact . . . with knowledge of the standards applicable to the determination of those facts.” State v. Jones, 34 Wn. App. 848, 851, 664 P.2d 12 (1983). Those findings are absent in this case.

Although the trial court entered oral rulings, the appellate court should not have to comb these rulings to determine if there are appropriate findings, nor should a defendant be required to interpret oral rulings. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). A court’s oral rulings are not an adequate substitute for the written findings and conclusions mandated by CrR 3.5.

“When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy.” State v. Smith, 68 Wn. App. 201, 211, 842 P. 2d 494 (1992). Although Smith involved a CrR 3.6 hearing, its reasoning applies equally to CrR 3.5

hearings. See Smith, 68 Wn. App. at 205 (“[T]he State’s obligation is similar under both CrR 3.5 and CrR 3.6). But when no actual prejudice would arise from the failure of the court to file written findings and conclusions, the remedy is remand for entry of the written order. Head, 136 Wn.2d at 624. Here, no findings of fact and conclusions of law were filed after the CrR 3.5 hearing, and remand for entry of the findings and conclusions is appropriate. Id.

Assuming the State ultimately presents the findings and conclusions and the court signs them, reversal will still be required if the delayed entry prejudices Anderson. State v. Portomene, 79 Wn. App. 863, 864, 905 P.2d 1234 (1995); see also State v. B.J.S., 72 Wn. App. 368, 371, 864 P.2d 432 (1994). For example, prejudice will result from untimely written findings and conclusions if there is indication the findings have been “tailored” to meet issues raised on appeal. Head, 136 Wn.2d at 624-25; Portomene, 79 Wn. App. at 865. In State v. Litts, 64 Wn. App. 831, 837, 827 P.2d 304 (1992), this Court held, “[I]f the State fails to file written findings and conclusions until after the appellant has submitted his or her opening brief, and the record reflects that the findings and conclusions were tailored to address the assignments of error raised in appellant’s brief, prejudice may be found.”

This Court should remand Anderson's case for entry of findings and conclusions. Depending on their content, Anderson reserves the right to address the issue of prejudice or tailoring in his reply brief or, if necessary, in a supplemental brief.

3. ANDERSON'S CONVICTION MUST BE REVERSED
BECAUSE THE UNDERLYING NO-CONTACT ORDER
IS UNCONSTITUTIONALLY VAGUE.

Anderson's conviction for violation of a no-contact order must be reversed because the order is unconstitutionally vague in defining the prohibited area. Because he lacked sufficient notice of what conduct was prohibited, his conviction for violating the order must be reversed.

Criminal statutes are void for vagueness when they do not define the criminal offense with sufficient definiteness that an ordinary person can understand what conduct is prohibited. State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001) (quoting City of Bellevue v. Lorang, 140 Wn.2d 19, 30, 992 P.2d 496 (2000)). This doctrine stems from the due process requirement that statutes must provide fair notice of what conduct is forbidden. Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972). A statute fails when persons of ordinary intelligence must necessarily "guess at its meaning and differ as to its application." State v. Watson, 160 Wn.2d 1, 6, 154 P.3d 909 (2007)

(quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)).

These principles apply with equal force to court orders that make certain conduct unlawful for an individual. For example, courts vacate terms of community custody that are unconstitutionally vague. State v. Sanchez Valencia, 169 Wn.2d 782, 794-95, 239 P.3d 1059 (2010). When a court order is at issue, courts treat it as if it were a statute and apply standard rules of statutory construction. State v. Bahl, 164 Wn.2d 739, 753–754, 193 P.3d 678 (2008). However, unlike statutes, court orders such as conditions of community custody are not presumed to be constitutional. Sanchez Valencia, 169 Wn.2d at 793.

The order that Anderson was convicted of violating prohibits him from coming within a certain distance of his mother's home. Ex. 1; RP 80. But the order is vague as to what that distance is. The testimony at trial was that the distance was two blocks. RP 80, 110. But a look at the actual order makes it very difficult to discern what the order says. Ex. 1. The handwriting is illegible. If one knows that it is supposed to say "blocks" then one can begin to make out the letters "b," "l," and "k." Ex. 1. Without an oral explanation to explain the order's notation, it would be entirely unclear what area was prohibited.

Even assuming the term “two blocks” were to be fairly read in the order, that term is unconstitutionally vague. A reasonable person must necessarily guess, and reasonable persons would differ as to the application of that standard. When a term is undefined, courts turn first to a dictionary definition to provide the plain and ordinary meaning. Bahl, 164 Wn.2d at 754. The relevant dictionary definition of a block includes, “a usu. Rectangular space (as in a city) enclosed usu. By streets but sometimes by other bounds (as rivers or railroads) and occupied by or intended for buildings” and “the distance along one of the sides of such a block.” Webster’s Third New International Dictionary 235 (1993).

The question for a person attempting to obey the order then becomes what distance or space is meant when blocks are of differing lengths and the distance may not be in a straight line. If the distance were given in a standard unit of measurement such as meters or feet, this would provide guidance. But the length of a block may vary greatly. Many blocks are significantly longer than they are wide, so when movement is in two directions, a reasonable person would have to guess at the applicable side for determining the distance included in a block. When the order specifically states two blocks, and the originating point is not at the end of a block, it is impossible to determine which block is to be the measure for how to count portions of a block.

A block is at best an approximate distance. An approximation is insufficient when excluding a person from parts of the neighborhood where he grew up and where his friends live. RP 81. This order impacts Anderson's constitutional right to travel. See State v. Sims, 152 Wn. App. 526, 531, 216 P .3d 470 (2009), aff'd 171 Wn.2d 436 (2011) (Order excluding individual from geographic area encroached on right to travel).

The vagueness of the two-block description is also shown by the differing witness testimony. Winters and Anderson's mother both testified that the spot where he was arrested was two blocks from her home. RP 82, 110. But her husband, who also lives there, testified it was three blocks. RP 90. The differing testimony shows that reasonable persons familiar with the area could, and did, differ on the extent of the prohibited two block area.

To convict Anderson of violating an order that was unconstitutionally vague is manifest constitutional error that requires reversal under RAP 2.5. An error may be raised for the first time on appeal when it is truly of constitutional magnitude and has practical and identifiable consequences at trial. Harris, 154 Wn. App. at 94. That is the case here.

Constitutional due process was violated because Anderson did not receive fair warning of what conduct was prohibited. The error had practical consequences at trial because he was convicted on facts showing that he was somewhere near the vague two-block boundary. The location where police

found him was “approximately two blocks” from his mother’s house according to the police officer. RP 110. It was three blocks according to his mother’s husband. RP 89-90. This vagueness and uncertainty about the precise distance he had to stay away from his mother’s house is what led to his conviction. The illegible order requiring Anderson to stay two blocks away from his mother’s house was unconstitutionally vague. His conviction for violating it should be reversed.

4. PROSECUTORIAL MISCONDUCT VIOLATED
ANDERSON’S RIGHT TO A FAIR TRIAL.

During closing argument, the prosecutor misstated the law regarding the presumption of innocence and the mental state required to prove the charged offense. RP 164, 174. During initial closing argument, the prosecutor essentially relieved the State of its burden to prove a knowing violation of the no-contact order when he told the jury that knowledge is also established by acting intentionally and “everything we do, we do intentionally.” RP 164. Then, during rebuttal, the prosecutor misled the jury about the enduring nature of the presumption of innocence when he told jurors, “those facts lead to one conclusion, and you already know what that conclusion is.” RP 174. These misstatements were flagrant and ill-intentioned misconduct that violated Anderson’s right to a fair trial. His

- a. The prosecutor misstated the law regarding the State's burden to prove the mental element of the offense.

“The prosecutor may not misstate the law to the jury.” State v. Swanson, 181 Wn. App. 953, 959, 327 P.3d 67, review denied, 339 P.3d 635 (2014). A prosecutor commits misconduct by attempting to mislead the jury regarding its duty to acquit: “By misstating the basis on which a jury can acquit, the State ‘insidiously shifts the requirement that [it] prove the defendant’s guilt beyond a reasonable doubt.’” State v. Vassar, 188 Wn. App. 251, 260, 352 P.3d 856 (2015) (quoting In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012)). “The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.” State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

The prosecutor misstated the law and attempted to relieve the State of its burden of proof when he argued to the jury that knowledge is established by acting intentionally and “whatever we do, we do intentionally.” RP 164. The State was required to prove that Anderson “knowingly violated a provision” of the no-contact order. CP 24; RCW 26.50.110; State v. Sisemore, 114 Wn. App. 75, 77-78, 55 P.3d 1178 (2002) (citing State v. Clowes, 104 Wn. App. 935, 944-45, 18 P.3d 596 (2001)). This requirement means that the person must not only know of the no-

contact order and perform an intentional action. To be guilty of a violation, the person must also intend the contact that occurs. Id. Jury instructions are incorrect if they would permit the jury to convict based on inadvertent or accidental contact. Id. Thus, in order to convict Anderson, the jury needed to find not merely that he intentionally walked to a location in the prohibited area, but that he intentionally, not inadvertently, entered the prohibited area.

By telling the jury that “whatever we do, we do intentionally,” the prosecutor told the jury it could convict so long as Anderson was engaging in any intentional act such as walking or driving when he entered the prohibited area, even if his entry into the prohibited area was inadvertent. The prosecutor’s argument misstated this law and relieved the State of its burden to prove this element of the offense.

b. The prosecutor undermined the presumption of innocence.

The presumption of innocence continues throughout the entire trial and may only be overcome, if at all, during deliberations. State v. Evans, 163 Wn. App. 635, 644, 260 P.3d 934, 939 (2011); State v. Venegas, 155 Wn. App. 507, 524, 228 P.3d 813 (2010) (citing 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (3d ed. 2008)). But the prosecutor here told jurors, during closing argument, “You already know what that conclusion is.” RP 174. This comment misstated the law and

misled the jury about the presumption of innocence, the bedrock of our criminal justice system. By eroding the presumption of innocence prior to deliberations, the prosecutor's misconduct deprived Anderson of a fair trial and requires reversal of his conviction.

The presumption of innocence lies at the heart of our criminal law. Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, 403, 39 L. Ed. 481 (1895); State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). It is a fundamental component of a fair trial, deriving from the Due Process guarantees of the Fifth and Fourteenth Amendments. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)**Error! Bookmark not defined.**; Taylor v. Kentucky, 436 U.S. 478, 485-86 n. 13, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978).

Juries must be specifically instructed on the presumption of innocence. State v. McHenry, 13 Wn. App. 421, 424, 535 P. 2d 843, 845 (1975) aff'd, 88 Wn. 2d 211 (1977)**Error! Bookmark not defined.**; see also Taylor, 436 U.S. at 485 (refusal to give requested instruction on presumption of innocence violated due process). This instruction performs two separate functions. First, it reminds the jury that the State bears the burden of persuading the jury of the defendant's guilt beyond a reasonable doubt, and absent such proof, the jury must acquit. United States v. Thaxton, 483 F.2d 1071, 1073 (5th Cir. 1973). Second, it cautions jurors to remove from their

minds any suspicion arising from the arrest and charge itself and to reach their conclusion solely from the evidence presented at trial. Id. (quoting 9 Wigmore on Evidence § 2511, at 407 (3d ed. 1940)).

Two Washington cases make clear that the prosecutor's comments in this case were misconduct that undermined the presumption of innocence. In Venegas, the prosecutor stated that the presumption of innocence erodes every time the jury hears evidence of the defendant's guilt. 155 Wn. App. at 524. This Court held that the prosecutor committed flagrant misconduct by making an improper argument with no basis in law. Id. at 525.

A similar comment was condemned in Evans, 163 Wn. App. at 644. There, the prosecutor told jurors the presumption of innocence, "kind of stops once you start deliberating." Id. at 643. Finding this comment just as troubling as the one in Venegas, the court concluded the prosecutor's comment "invited the jury to disregard the presumption once it began deliberating." Id. The court further noted that this idea "seriously dilutes the State's burden of proof." Id. at 643-44. Particularly given the prosecutor's quasi-judicial role of ensuring that all defendants receive a fair trial, the court concluded this comment, "overstepped the bounds of ethical advocacy." Id. at 646.

The comment here was akin to the comments in Venegas and Evans because it encouraged the jury to set aside the presumption of innocence. It

undermined that presumption by affirming any jurors who had a tendency to abandon the presumption prior to deliberations. An impartial juror who is giving actual credence to the presumption of innocence cannot “know” his or her conclusion during closing argument. For the prosecutor to suggest otherwise is misconduct that undermines the presumption of innocence and reversal is required.

c. The prosecutor’s misconduct requires reversal.

A misstatement of law requires reversal when there is a substantial likelihood that it affected the jury’s verdict and thereby denied the defendant a fair trial. State v. Allen, 182 Wn.2d 364, 375, 341 P.3d 268 (2015). Even without an objection, reversal is required when a prosecutor’s remark is so flagrant and ill-intentioned that it causes an enduring prejudice that could not have been cured by instructing the jury. State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). The prosecutor’s statements caused such prejudice here.

This analysis focuses on the prejudice to the defendant and whether it could have been cured. Id. at 762. In State v. Johnson, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010), the court found “great prejudice” from a misstatement about the presumption of innocence, despite correct written jury instructions. The court declared,

Although the trial court's instructions regarding the presumption of innocence may have minimized the negative impact on the jury, and we assume the jury followed these instructions, a misstatement about the law and the presumption of innocence due a defendant, the "bedrock upon which [our] criminal justice system stands," constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights.

Id. (citing Bennett, 161 Wn.2d at 315; State v. Anderson, 153 Wn. App. 417, 432, 220 P.3d 1273 (2009)). In both Evans and Venegas, the court reversed where the prosecutor engaged in multiple unfair attacks on the presumption of innocence, including comments very similar to those made in this case. Evans, 163 Wn. App. at 648; Venegas, 155 Wn. App. at 525. Anderson asks this Court to reverse.

Despite correct written jury instructions, a misstatement of the burden of proof "constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." Johnson, 158 Wn. App. at 685-86. Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); see also Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935) (because average juror is conscious of prosecutor's special role, "improper suggestions, insinuations, and . . . assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none"). Statements made during

closing argument are presumably intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984). Otherwise, there would be no point in making them. Although jurors are instructed to disregard any argument not supported by the court's instructions, they are also instructed to consider the lawyers' remarks because they are "intended to help you understand the evidence and apply the law." CP 45 (Instruction 1).

Due process was undermined here because the jury was in no position to determine whether the prosecutor's misstatements of the law were correct. This left defense counsel in the unenviable position of having to persuade the jury what the law is. The prosecutor violated Anderson's right to a fair trial by placing that burden on the defense, relieving the State of its burden to prove the required mental state beyond a reasonable doubt, and undermining the presumption of innocence and the jury's duty to remain impartial.

5. COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT WHEN THE PROSECUTOR UNDERMINED THE BURDEN OF PROOF AND THE PRESUMPTION OF INNOCENCE

The failure to object during closing argument can constitute ineffective assistance of counsel when the prosecutor's conduct was both improper and prejudicial. In re Pers. Restraint of Cross, 180 Wn.2d 664, 721, 327 P.3d 660 (2014) (citing State v. Gentry, 125 Wn.2d 570, 643-44, 888

P.2d 1105 (1995). That is the case here. In the event this Court should find the prosecutorial misconduct issue was waived due to failure to object, this Court should nonetheless reverse due to counsel's ineffective assistance in failing to ensure Anderson received the full benefit of the presumption of innocence and the burden of proof beyond a reasonable doubt of every element of the offense.

“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). The constitutional right to effective assistance of counsel is violated when the attorney's performance is unreasonably deficient and it is reasonably probable that deficiency affected the outcome of the trial. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Whether counsel provided ineffective assistance is 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).**Error!**
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Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent performance is overcome by demonstrating “the absence of legitimate strategic or tactical reasons supporting the challenged

conduct by counsel.” State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Failure to preserve error can also constitute ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see State v. Allen, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

Counsel was ineffective in failing to object or move for mistrial based on arguments that misstated the law regarding the mental state required to convict and improperly deprived Anderson of the full benefit of the presumption of innocence. Without those argument, the jury would have been far more likely to find reasonable doubt. The jury was likely left with an impression of the law akin to the prosecutor’s argument in Venegas, that the presumption of innocence had already eroded, and the jury need not evaluate the evidence in light of this presumption. 155 Wn. App. at 524. The primary disputed issue in this case was whether Anderson was in fact within the two-block prohibited radius and, if so, whether he knew he was. Failure to apply the presumption of innocence, and applying the rationale that any intentional act would prove the requisite knowledge was likely to play a decisive role in the outcome.

Because there was a reasonable likelihood the jury misapplied the presumption of innocence, the bedrock principle of the criminal justice

system, this Court should reverse Anderson's conviction. See United States v. Doyle, 130 F.3d 523, 539 (2d Cir. 1997) (presumption of innocence continues during deliberations; jury charge suggesting otherwise "creates a serious risk of undermining that vital protection"). Anderson was prejudiced by his attorney's failure to object to argument misstating the presumption of innocence and the mental state required for conviction. His conviction should, therefore, be reversed.

6. CUMULATIVE ERROR DEPRIVED ANDERSON OF A FAIR TRIAL.

Taken cumulatively, the error in admitting Anderson's statements, the unconstitutionally vague no-contact order, and the prosecutor's misconduct that passed without objection to due to ineffective assistance of counsel deprived Anderson of a fair trial. Every criminal defendant has the constitutional due process right to a fair trial. Davenport, 100 Wn.2d at 762; U.S. Const. Amend. XIV; 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)**Error! Bookmark not defined.**; Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). The

combined errors here produced a trial that was unfair. Anderson's conviction must be reversed.

7. THE COURT VIOLATED DUE PROCESS WHEN IT PENALIZED ANDERSON'S EXERCISE OF HIS RIGHT TO A JURY TRIAL BY DENYING HIS DOSA REQUEST.

The court violated Anderson's due process rights when it denied his request for a drug offender sentencing alternative (DOSA) as a penalty for his decision to exercise his constitutional right to a jury trial. When considering whether to impose a DOSA, a trial judge must "exercise this discretion in conformity with the law." State v. Grayson, 154 Wn. 2d 333, 335, 111 P.3d 1183, 1184 (2005). "Within the statutory and constitutional guidelines, judges may exercise their discretion to give a fair and just sentence." Id. at 339. The judge in this case violated those statutory and constitutional guidelines in two respects. First, the judge's categorical refusal to consider a DOSA for offenders who exercise their right to jury trial is a failure to exercise discretion. Second, denying the DOSA as a penalty for exercising the right to a jury trial is an impermissible penalty attached to the exercise of a constitutional right.

A person requesting a DOSA is entitled to have that request "actually considered." Id. at 342. The categorical refusal to consider a DOSA for a class of offenders "is effectively a failure to exercise discretion and is subject to reversal." Id. For example, in Grayson, the trial court denied the DOSA

because it believed the program did not have sufficient funding. Grayson, Id. The court did not say this was the sole reason for the denial, but as the court noted, the judge did not articulate any other reasons. Id. The court determined that the trial court had categorically refused to consider the DOSA and reversed. Id. Considering these circumstances, the court concluded, “the trial court categorically refused to consider a statutorily authorized sentencing alternative, and that is reversible error.” Id. The court also noted the rule that the categorical refusal to consider the DOSA “for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal.” Id.

Here, the trial court refused to consider a DOSA for a class of offenders: those who exercise their constitutional right to a jury trial. RP 189. The court reasoned “it would not be at all unusual for that person to avoid trial by saying, look, I was there. I did the crime. I was within the two-block radius. You don’t have to take me to trial and prove that. I’ve got a problem.” RP 189. The court continued, “That’s not what Mr. Anderson did.” RP 189-90. This was not a discretionary determination that Anderson was not a good candidate for a DOSA. It was a categorical refusal to consider the DOSA for this entire class of offenders, namely, those who stand trial. The court abused its discretion in failing to exercise that discretion, and the sentence should be reversed. Grayson, 154 Wn.2d at 342.

In addition to failing to exercise its discretion, the trial judge also violated Anderson's constitutional rights by penalizing him for exercising his right to a jury trial. The imposition of a penalty for the exercise of a defendant's legal rights violates due process." State v. Sandefer, 79 Wn. App. 178, 181, 900 P.2d 1132 (1995) (citing Bordenkircher v. Hayes, 434 U.S. 357, 363-64, 98 S. Ct. 663, 668, 54 L. Ed. 2d 604 (1978)). "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." Bordenkircher, 434 U.S. at 363. "It is well settled that an accused may not be subjected to more severe punishment simply because he exercised his right to stand trial." United States v. Medina-Cervantes, 690 F.2d 715, 716 (9th Cir. 1982). The Ninth Circuit has articulated an appropriate standard to apply in such cases: "the record must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty." United States v. Stockwell, 472 F.2d 1186, 1188 (9th Cir. 1973).

In denying Anderson's request for a DOSA, the court punished Anderson for exercising his right to stand trial, essentially declaring that, if Anderson really wanted treatment, he would have pleaded guilty. RP 189. This case should be remanded for resentencing before a different judge

because the sentencing judge used Anderson's DOSA request as a means of punishing him for exercising his constitutional right to a jury trial.

8. THE COURT VIOLATED ANDERSON'S RIGHT TO ALLOCUTION BY SENTENCING HIM BEFORE PERMITTING HIM TO SPEAK.

Anderson's right to allocution at sentencing was violated when the Court did not permit him to exercise that right until after the sentence had already been pronounced. Violation of the statutory right to allocution under RCW 9.94A.500 is reviewed de novo on appeal. State v. Hatchie, 161 Wn.2d 390, 395, 166 P.3d 698 (2007).

Washington law requires that the court "shall . . . allow arguments from . . . the offender . . . as to the sentence to be imposed." RCW 9.94A.500(1). "'Allowing' allocution means soliciting a statement from the defendant prior to imposition of sentence." State v. Crider, 78 Wn. App. 849, 859, 899 P.2d 24 (1995). "Trial courts should scrupulously follow [the statute] by directly addressing defendants during sentencing hearings, asking whether they wish to say anything to the court in mitigation of sentence, and allowing 'arguments from . . . the offender[s] . . . as to the sentence to be imposed.'" In re Echeverria, 141 Wn.2d 323, 336-37, 6 P.3d 573 (2000) (quoting former RCW 9.94A.110).

The law requires an opportunity for the defendant to be heard before sentence is pronounced. Crider, 78 Wn. App. at 861. "[A]n opportunity to

“speak extended for the first time after sentence has been imposed is ‘a totally empty gesture.’” Id.

For example, in Crider, the court entered judgment, and Crider immediately filed a notice of appeal because the court had not asked him if he wished to address the court. Id. at 853. The court then asked Crider if he wanted to say anything, and he gave a brief statement. Id. The court then rejected a requested SSOSA and imposed the same sentence it first announced. Id. at 851-853, 861. On appeal, the court remanded for resentencing. Id. at 861. “Allowing,” allocution, the court reasoned, “means soliciting a statement from the defendant prior to imposition of sentence.” Id. at 859. The law requires ““a specific and personal invitation to speak from the trial judge to the defendant.”” Id. at 860 (quoting Green v. United States, 365 U.S. 301, 307, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961) (Black, J., dissenting)).

Similarly, in State v. Aguilar-Rivera, 83 Wn. App. 199, 200-201, 920 P.2d 623 (1996), the court announced its sentence, and then defense counsel pointed out that the court had not provided the defendant with an opportunity to address the court. This Court held that “the appearance of fairness requires that when the right of allocution is inadvertently omitted until after the court has orally announced the sentence it intends to impose, the remedy is to send

the defendant before a different judge for a new sentencing hearing.” Id. at 203.

Here, the court should likewise remand for resentencing before a different judge because, as in Cridler, Anderson’s right to allocution was reduced to an empty gesture. The court announced, “I’m inclined to sentence Mr. Anderson to 60 months on the crime. . . . So that’s the – that’s the court’s sentence at this time.” RP 190. Only then did the court say, “Mr. Anderson, I apologize. I didn’t give you the opportunity. Is there anything you want me to consider before I finalize that sentence? Is there anything you want to say to address the court?” RP 190. Possibly realizing that the court had already made up its mind, Anderson declined. RP 190.

“Failure by the trial court to solicit a defendant’s statement in allocution constitutes legal error.” Hatchie, 161 Wn.2d at 405. This Court should vacate Anderson’s sentence and remand for resentencing before a different judge.

9. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Anderson indigent and entitled to appointment of appellate counsel at public expense. CP 55-56. If Anderson does not prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160 (1) states the “court of appeals . . . 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). Thus, this Court has discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Anderson’s ability to pay must be determined before discretionary costs are imposed. At the time of his conviction, Anderson declared under penalty of perjury that he was on public assistance of \$194 per month and had no other income or assets. CP 51-54. The finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2(f). Without a basis to determine that Anderson has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

For the foregoing reasons, Anderson's conviction should be reversed. Alternatively, the sentence should be reversed and the case remanded for resentencing before a different judge.

DATED this 11th day of December, 2017.

Respectfully submitted,

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