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Division III  
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No. 35915-8-III

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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL CANEDY,

Appellant.

---

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

The Honorable Judge Gary Libey

APPELLANT'S OPENING BRIEF

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### **A. SUMMARY OF ARGUMENT**

Following a report of erratic driving in a Rosalia industrial area, Whitman County Sheriff's Deputy Michael Jordan responded to investigate. He located a vehicle spinning its tires and revving its engine. He turned on his emergency lights and siren and a chase ensued. At its conclusion, Michael Lee Canedy was identified as the vehicle's driver. His two passengers were identified as Grace Ashworth and Cameron Hunter. Based on these events, the State charged Mr. Canedy with one count of Attempt to Elude a Police Vehicle.

At the jury trial held on the charge, Deputy Jordan and Ms. Ashworth testified, without objection from defense counsel, that Mr. Canedy's vehicle had been traveling at speeds of fifty to eighty miles per hour while being pursued by the patrol vehicle operating its lights and siren. During closing argument, defense counsel urged the jury to render a verdict based on their "gut," their "feeling," their "conviction," and what they "believed the evidence said to them." The jury convicted Mr. Canedy as charged.

Mr. Canedy now appeals, arguing defense counsel's repeated failure to object to witnesses' estimates of his vehicle's speed constitutes ineffective assistance of counsel because that testimony violated ER 701. He also argues that defense counsel's diminishment of the State's burden

of proof in closing argument constitutes ineffective assistance of counsel.

Mr. Canedy also preemptively objects to the imposition of any appellate costs.

### **B. ASSIGNMENTS OF ERROR**

1. Mr. Canedy was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to testimony regarding witness's estimate of his vehicle's speed.
2. Mr. Canedy was denied his Sixth Amendment right to effective assistance of counsel when defense counsel's statements in closing argument misstated the law and lowered the State's burden of proof.
3. An award of costs on appeal against Mr. Canedy would be improper in the event the State is the substantially prevailing party.

### **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether Mr. Canedy was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to testimony regarding witness's estimate of his vehicle's speed.

Issue 2: Whether Mr. Canedy was denied his Sixth Amendment right to effective assistance of counsel when defense counsel's statements in closing argument misstated the law and lowered the State's burden of proof.

Issue 3: Whether this court should deny costs against Mr. Canedy on appeal in the event the State is the substantially prevailing party.

### **D. STATEMENT OF THE CASE**

At approximately 10:20 p.m. on October 28, 2017, Whitman County Sheriff's Deputy Michael Jordan responded to a call reporting erratic driving at the storage areas in Rosalia near First and Park Streets.

(RP 18, 20). As he drove down a hill toward the area, he saw a vehicle with its lights on spinning around in the gravel. (RP 28). Through his open driver's window, he heard the vehicle's engine accelerating and gravel being thrown from the tires. (RP 28).

The vehicle's headlights were initially facing toward him. (RP 29). As he rounded the corner at the storage shed, the vehicle turned around, and drove through a gravel driveway, away from his patrol vehicle. (RP 30).

Deputy Jordan activated his lights and siren. (RP 30-31). The driver of the vehicle then turned off the vehicle's headlights. (RP 31). The vehicle continued along the gravel driveway, driving up onto the approach for weigh scales through a dark area with various heavy equipment scattered around. (RP 31-32). The vehicle then turned left onto Fourth Street. (RP 31-33). The vehicle proceeding up a hill and across some railroad tracks as the deputy continued the pursuit. (RP 36).

The vehicle failed to stop for a stop sign, taking a right-hand turn at approximately twenty/twenty-five miles per hour, by Deputy Jordan's estimate. (RP 38). Ultimately, the vehicle came to a stop and Deputy Jordan identified Michael Lee Canedy as the driver. (RP 39-40). Mr. Canedy had two passengers, Grace Ashworth and Cameron Hunter. (RP 39-40).

Based on this event, the State of Washington charged Mr. Canedy with Attempt to Elude a Police Vehicle, committed as follows:

That the said Michael Lee Canedy on or about the 28th day of October, 2017, in the State of Washington, as a driver of a motor vehicle, did willfully fail or refuse to immediately bring his or her vehicle to a stop and did drive his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after having been given a visual or audible signal to bring the vehicle to a stop, said signal having been given by hand, voice, emergency light, or siren by a uniformed police officer whose vehicle was equipped with lights and sirens...

(CP 49, 51).

The case proceeded to jury trial. (RP 14-121). Witnesses testified consistent with the facts stated above. (RP 14-98). In addition, Deputy Jordan testified, without objection from defense counsel, regarding the vehicle's speed:

[Deputy Jordan:] It was accelerating quickly um and it was definitely going over the speed limit. I would estimate we reached speeds there of fifty miles an hour.

[The State:] Okay, not initially fifty, but it got to fifty?

[Deputy Jordan:] Yeah, it got up to fifty.

(RP 30).

Deputy Jordan again testified, without objection from defense counsel, to the vehicle's speed:

[The State:] As the defendant went through this area and then you say up to a point when he turned left onto Fourth Street, about how fast were you going?

[Deputy Jordan:] I would say I was going about fifty miles an hour.

[The State:] Did you get a pace on him?

[Deputy Jordan:] I did not.

[The State:] Or radar?

[Deputy Jordan:] I did not.

[The State:] Um so you're going about fifty, are you keeping up with him? Are you overtaking him?

[Deputy Jordan:] No, in this area I was not keeping up or overtaking him.

[The State:] Uh why not go faster?

...

[Deputy Jordan:] It was not safe at all.

(RP 33-34).

Deputy Jordan testified the vehicle drove at this speed through an area no wider than a truck scale in close proximity to a large propane tank and under a metal catwalk. (RP 33-35).

The deputy testified, again without objection, from defense counsel:

[The State:] Now, you say going at a pretty good speed. Estimate?

[Deputy Jordan:] I would estimate in that distance there we got up to around eighty miles an hour.

[The State:] Okay.

[Deputy Jordan:] And so that's kind of starting there maybe around forty miles an hour or so.

[The State:] At the railroad track?

[Deputy Jordan:] At the railroad tracks, yeah.

[The State:] Um is it possible --- now let's talk about that eighty mile an hour estimate, is it possible that that estimate is high, that it could have been lower?

[Deputy Jordan:] Oh definitely, yeah.

[The State:] Could it have been as low as three miles an hour?

[Deputy Jordan:] As low as what?

[The State:] Thirty.

[Deputy Jordan:] I think it was much faster than that.

(RP 37).

Ms. Ashworth testified she and Mr. Hunter were passengers in Mr. Canedy's vehicle on the date in question. (RP 64, 65). She testified she was sixteen years old, had passed a driver's education course, and had a learner's permit for between six months and a year. (RP 62-63). She testified, without objection by defense counsel, to the speed of Mr. Canedy's vehicle:

[The State:] Um oh speed of the car. So you have --- have you gotten a sense of what twenty-five miles an hour feels like?

[Ms. Ashworth:] Yes.

[The State:] And a sense of what fifty miles an hour feels like?

[Ms. Ashworth:] Yes.

[The State:] Were you able to form an opinion, I mean let me first ask this. Did you look at the speedometer, you know, from the backseat, did you look at the speedometer to see what it said or anything?

[Ms. Ashworth:] No.

[The State:] But were you able to form an opinion, just generally, about how fast the car was going?

[Ms. Ashworth:] It was faster than twenty-five.

[The State:] Okay, faster than twenty-five. Was it faster than thirty-five?

[Ms. Ashworth:] I'd say so.

[The State:] Was it as fast as fifty?

[Ms. Ashworth:] Close, but I'm not exactly sure.

(RP 72-73).

Mr. Hunter testified he was also a passenger in the vehicle that night. (RP 75). He testified he initially thought the patrol vehicle was a “normal civilian of Rosalia going down the road.” (RP 79). He stated Mr. Canedy shut off his headlights but he “wouldn’t be able to tell you” why that occurred. (RP 79-80). He testified had no idea how fast the car was going and did not hear a police siren. (RP 80). Mr. Hunter stated did not see red and blue lights until they reached the train tracks. (RP 80). He testified thought there was a stop sign at the corner after the railroad tracks, but did not remember whether Mr. Canedy stopped for it. (RP 83).

William Millard testified on behalf of Mr. Canedy. (RP 90-96). Mr. Millard testified he was Mr. Canedy’s next-door neighbor and was familiar with Mr. Canedy’s vehicle. (RP 90). He testified Mr. Canedy had complained to him about the vehicle having problems jerking when it reached twenty-five to thirty miles per hour. (RP 92). Mr. Millard drove the vehicle and observed it hesitating around that speed. (RP 93). He testified that it “couldn’t have reached eighty miles an hour on a flat mile stretch.” (RP 95).

After Mr. Millard testified, the State recalled Deputy Jordan. (RP 97-98). He testified that when he arrested Mr. Canedy, Mr. Canedy told him that he was having problems with the car’s fuel filter, but “after it warms up it runs nice though.” (RP 97-98).

The court instructed the jury in pertinent part as follows:

INSTRUCTION NO. 2 – The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State of Washington, is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

...

INSTRUCTION NO. 8 – To operate a motor vehicle in a reckless manner means to drive in a rash or heedless manner, indifferent to the consequences.

(CP 9, 15; RP 102, 104-105).

In closing argument, the State argued that the speed at which Mr.

Canedy was driving was rash and heedless, given the surroundings:

[The State:] ...it's not super-fast, fifty in a twenty-five, not that hard to do. But, on the gravel drive area where there's objects that you can run into and it's dark and you're going that fast. My gosh, thirty miles an hour with the propane tank. With the --- with the catwalk. Thirty-five miles an hour through there in the dark.

(RP 112).

The State used Deputy Jordan and Ms. Ashworth's speed estimates to further argue recklessness:

[The State:] It's was rash and headless [sic] because rash and headless [sic] to go thirty-five. The Deputy says fifty through here. The Deputy says he wasn't --- he wasn't overtaking him. He could have tried to, but no way. That would be unsafe. He couldn't do it in his rig. Then we have the turn onto the railroad tracks. They [sic] Deputy's estimate here is eighty um is that estimate high? It might be. It might be. [Ms.] Ashworth, a new driver, told you, a person who has had driver's ed more recently than anybody, she told you he was going faster than twenty-five. Faster than thirty-five? Yeah, faster than thirty-five. As much as fifty? Um, it could have been. She's getting up to fifty and she's [inaudible] okay so fifty miles an hour. Rash and heedless.

(RP 112).

Defense counsel discussed the State's burden of proof in closing argument, stating, "so, you don't have to consider anything other than your gut instinct . . . ." (RP 114). In concluding his closing argument, defense counsel described the beyond a reasonable doubt standard as "you know, make the decision based on your strength, your feeling, your conviction, what you believe the evidence said to you." (RP 117).

The jury found Mr. Canedy guilty as charged. (CP 75; RP 121). The trial court imposed \$800 in mandatory legal financial obligations. (CP 22). The trial court made no inquiry at sentencing into Mr. Canedy's ability to pay legal financial obligations. (RP 123-134).

The felony judgment and sentence contains the following boilerplate language: “[a]n award of costs on appeal against the defendant may be added to the total financial obligations.” (CP 23).

The trial court found Mr. Canedy indigent for purposes of appeal and granted him a right to review at public expense. (CP 77-79).

Mr. Canedy timely appeals. (CP 53-65).

### **E. ARGUMENT**

**Issue 1: Mr. Canedy was deprived of his Sixth Amendment right to effective assistance of counsel when defense counsel failed to object to testimony regarding witness’s estimate of his vehicle’s speed.**

Mr. Canedy was deprived of his Sixth Amendment right to effective assistance of counsel when his counsel failed to object to testimony of estimated speed given by Deputy Jordan and Ms. Ashworth. The trial court would have sustained an objection to that testimony because the witnesses had no basis for their opinions. Because the State’s case rested on argument that Mr. Canedy’s speed was reckless given his surroundings and the conditions, the result of the trial would have been different had the evidence not been admitted. There is no tactical reason that defense counsel would not have wanted to exclude this damaging evidence.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668,

685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must demonstrate (1): [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objection standard of reasonableness based on consideration of all of the circumstances; and (2) defense counsel’s deficient performance prejudiced the defendant, *i.e.* there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

In other words, prejudice is established by showing that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *State v. Hicks*, 163 Wn.2d 477, 488, 181P.3d831(2008)(quoting *Strickland*, 466 U.S. at 687).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). “[S]trategy must be based on reasoned decision-

making[.]” *In re Pers. Restraint of Hubert*, 138 Wn.App. 924, 928, 158 P.3d 1282 (2007).

To prove the failure to object to the admission of evidence constituted ineffective assistance of counsel, a defendant must show “that the failure to object fell below prevailing professional norms, that the objection would have been sustained, . . . that the result of the trial would have been different if the evidence had not been admitted[.]” and that the decision was not tactical. *State v. Sexsmith*, 138 Wn. App. 497, 509, 157 P.3d 901 (2007).

A lay witness may testify to opinions or inferences as long as they are rationally based on perceptions and are helpful to the jury. ER 701. Proper lay opinion testimony may include the speed of a vehicle, the mental responsibility or health of another, the value of one’s own property, and identification of a person. *State v. Kinard*, 39 Wn. App. 871, 874, 696 P.2d 603 (1985). The trial court is vested with wide discretion to admit or exclude evidence under ER 701. Comment, ER 701.

The defendant in *Kinard* was charged with first degree burglary, first degree theft, and second-degree burglary based on a late-night home invasion where the intruder jammed a pillow over the victim’s head,

pulled a ring off her finger, and stole other jewelry. *Kinard*, 39 Wn. App. at 872. The victim did not see the intruder, but only heard him speak. *Id.*

At trial, the victim testified, over objection, that the burglar “sounded black to me.” *Id.* As a basis for the opinion, she testified she had been married to a United States serviceman and had lived in the south for several years and on a United States military post overseas. *Id.* She perceived blacks as having a certain inflection or accent. *Kinard*, 39 Wn. App. at 872. She testified the burglar’s voice had a moderate to low pitch. *Id.*

While the court questioned the way in which the victim’s testimony was given, suggesting it could have been given in a “more raw form by way of a detailed description of her assailant’s accent and inflection,” it found no prejudicial error. *Kinard*, 39 Wn. App. at 874. The court also noted that the testimony could have been scrutinized on cross-examination, but was not. *Id.*

The witness in *Kinard* had an extensive basis for her opinion. However, here, unlike *Kinard*, both Deputy Jordan and Ms. Ashworth did not have an extensive basis for their opinions on the vehicle’s speed. Unlike in *Kinard*, where the witness had an extensive basis for her opinion, Deputy Jordan provided no testimony as to how he arrived at the

estimate of fifty miles per hour, for example, that he paced the vehicle or looked at his own speedometer.

Deputy Jordan testified, without objection, that when Mr. Canedy's vehicle initially accelerated away from his patrol car, it reached a speed of fifty miles per hour. (RP 30). He did not testify how he came to that conclusion. (RP 30). Deputy Jordan had not yet activated his lights and siren. (RP 30-31). Defense counsel's failure to object to this speedy estimate could not have been tactical, especially given the questionable relevance of a speed estimate prior to activation of the signal to stop.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. RCW 46.61.024 defines attempting to elude a police vehicle as:

[W]illfully failing or refusing to immediately bring his or her vehicle to a stop and driving in a reckless manner while attempting to elude a pursuing police vehicle, *after* having been given a visual or audible signal to bring the vehicle to a stop...

RCW 46.61.024 (Italics added).

Deputy Jordan testified that the vehicle was traveling fifty miles per hour *prior* to his initiation of the signal to stop. (RP 30). The speed of

the vehicle at that point was not relevant to whether the driver operated it in a reckless manner after being given the signal to stop.

Deputy Jordan then testified a second time, without objection, to his estimate that the vehicle was travelling fifty miles per hour, this time after he had turned on his lights and siren. (RP 33-34). The State then questioned him specifically as to whether he had obtained a pace on the other vehicle, or measured its speed with radar. (RP 33-34). He testified that he did not, but that going that speed was “not safe at all.” (RP 34).

In this instance, Deputy Jordan had no basis for his opinion. (RP 33-34). Nonetheless, Deputy Jordan provided a number as to the speed of Mr. Canedy’s vehicle and opined that it was not safe to operate the vehicle at that speed in that area. (RP 33-34). Throughout this testimony, defense counsel did not object. Had counsel objected, the objection would have been sustained because Deputy Jordan had no basis for his opinion.

Deputy Jordan then testified a third time, again without objection, that Mr. Canedy’s vehicle reached speeds of “around eighty miles per hour.” (RP 37). The vehicle was at that point proceeding up a hill and across some railroad tracks. (RP 36). Again, he provided no basis for his opinion. (RP 37).

Deputy Jordan was permitted to testify three times regarding Mr. Canedy’s vehicle allegedly reaching high speeds. (RP 30, 33-34, 37).

Each time, defense counsel did not object. The State rested its case on Mr. Canedy's speed being reckless in this geographic area because of the presence of the propane tank, heavy equipment, and a low catwalk. Had counsel objected to this speculative evidence, the objection would have been sustained as the deputy had no basis for his opinion. The State would have had insufficient evidence of recklessness and the outcome of the trial likely would have been different. *See McFarland*, 127 Wn.2d at 334-35 (setting forth the test for ineffective assistance of counsel).

In addition, Ms. Ashworth testified in much the same manner as Deputy Jordan to her estimate of the vehicle's speed. (RP 72-73). She testified, without objection from defense counsel, that she estimated the vehicle's speed to be close to fifty miles per hour. (RP 72). This was *after* she testified that she had not looked at the speedometer, had only recently passed driver's education, and had only been driving for six months to a year. (RP 62-63, 72-73). Counsel's failure to object to Ms. Ashworth's testimony, because she had no basis for her opinion, could not have been a tactical judgment. This falls below reasonable professional standards. The result of the trial would have been different without Deputy Jordan or Ms. Ashworth's speculative testimony as to Mr. Canedy's speed.

Defense counsel could not have had a tactical reason for failing to object to exclude this damaging evidence. Because the objections to the admissibility of this evidence would have been sustained and it was the evidence the State presented to prove recklessness, the result of the trial would have been different had the evidence not been admitted. Mr. Canedy has proven that such repeated failures to object to constitute ineffective assistance of counsel. *See McFarland*, 127 Wn.2d at 334-35. This Court should reverse Mr. Canedy's conviction and remand for a new trial.

**Issue 2: Mr. Canedy was deprived of his Sixth Amendment right to effective assistance of counsel when defense counsel's statements in closing argument misstated the law and lowered the State's burden of proof.**

Mr. Canedy was denied his Sixth Amendment right to effective assistance of counsel when defense counsel, in his closing argument, equated the "beyond a reasonable doubt" burden of proof to a "gut instinct." Defense counsel then further encouraged the jury to render its verdict based on a "feeling" or a "belief". This misstates the law as given in the trial court's Instruction No. 2, and impermissibly lowered the State's burden of proof. The result of the trial would have been different if defense counsel had not invited the jury to render a verdict based on a

lower burden of proof. The decision to make such an argument could not be tactical.

The applicable test for ineffective assistance of counsel is set forth in Issue 1 above. *See McFarland*, 127 Wn.2d at 334-35. In addition, the right of effective assistance of counsel extends to closing arguments. *Kyllo*, 166 Wn.2d at 870 (citing *Yarborough v. Gentry*, 540 U.S. 1, 5, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003)).

In *Kyllo*, the defendant claimed self-defense to a charge of second-degree assault. *Id.* at 859. Defense counsel argued in closing that to acquit based on self-defense, the defendant had to perceive that he was in danger of serious injury or death. *Id.* at 860-61. This incorrectly stated the law, as RCW 9A.16.020(3) provided that a person was entitled to act in self-defense when he reasonably apprehended he was about to be injured. *Id.* at 863. Our Supreme Court, in remanding for retrial, concluded that, “self-defense was *Kyllo*’s entire case...there was no tactical reason for making it more difficult for *Kyllo* to be acquitted on the basis of self-defense.” *Id.* at 869-870.

Here, similar to in *Kyllo*, there could have been no tactical reason for defense counsel to make it more difficult for Mr. Canedy to be acquitted based on lack of proof beyond a reasonable doubt. Given that the defense only called one witness, and speed estimates were the crux of

the State's argument for recklessness, whether the case was proven beyond a reasonable doubt was Mr. Canedy's defense. Defense counsel's repeated misstatements of the law during closing argument made it easier for the jury to convict Mr. Canedy based on an erroneous legal standard.

Misstatement of the reasonable doubt standard during closing argument has been examined extensively in the context of prosecutorial misconduct. *See, e.g., State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014); *State v. Evans*, 163 Wn. App. 635, 260 P.3d 934 (2011); *State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010); *State v. Venegas*, 155 Wn. App. 507, 228 P.3d 813 (2010).

In *Johnson*, the State argued in closing that, "to be able to find reason to doubt, you have to fill in the blank, that's your job." *Johnson*, 158 Wn App. at 682. The State also equated the "abiding belief" standard to a puzzle where after adding enough pieces to see half, the jury could be satisfied beyond a reasonable doubt as to the picture's subject. *Id.* Fill-in-the-blank arguments had been found improper because they implied that the jury had an initial duty to convict and that the defendant bore the burden of providing a reason for the jury not to convict him. *See State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009). The Court also reasoned that the partially completed puzzle analogy trivialized the State's burden by focusing on the degree of certainty the jurors needed to act and

implying jurors had a duty to convict unless there was a reason to acquit.

*Johnson*, 158 Wn. App. at 685.

Here, similarly, defense counsel's arguments that the jurors should go with their "gut," their "feeling," their "belief" trivialized the State's burden. (RP 114, 117). The arguments instructed the jurors that they could convict without any certainty as to the evidence, let alone certainty beyond a reasonable doubt. The outcome of the trial would have been different had defense counsel's arguments not trivialized the State's burden in such a way.

In *Johnson*, the court has stressed the gravity of a misstatement of the law regarding the presumption of innocence:

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.

*Johnson*, 158 Wn. App. at 685-86 (citing *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)); *Anderson*, 153 Wn. App at 432).

The arguments in the prosecutorial misconduct cases were made in the context of the prosecutor misstating the law in closing argument. However, it is equally impermissible for defense counsel to lower the burden of proof. Repeatedly misstating the law falls far below an

objective standard of reasonableness, especially when the burden of proof and presumption of innocence are at issue. There is no legitimate trial tactic for lowering the State's burden of proof. The result in Mr. Canedy's case would have been different but for his counsel's invitation to the jury to convict him. Therefore, Mr. Canedy has established that counsel's statements in closing argument constitute ineffective assistance of counsel. This Court should reverse Mr. Canedy's conviction and remand for a new trial.

**Issue 3: This court should deny appellate costs against Mr. Canedy on appeal in the event the State is the substantially prevailing party.**

Mr. Canedy preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612(2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).<sup>1</sup>

An order finding Mr. Canedy indigent was entered by the trial court, and there has been no known improvement to this indigent status. (CP 77-79).

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<sup>1</sup> The undersigned counsel anticipates filing Mr. Canedy's Report as to Continued Indigency within 60 days of filing this opening brief.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 835, 44 P.3d 680 (2015). In *Blazina*, our Supreme Court recognized the “problematic consequences” LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, the Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

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

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court’s reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, Mr. Canedy has demonstrated his indigency. In addition, as set forth above, it is not proper to defer the required ability to pay inquiry to the time the State attempts to collect costs. *See Blazina*, 182 Wn.2d at 832, n.1. Mr. Canedy would be burdened by the accumulation of significant interest and would be left to challenge the costs without the aid of counsel. RCW 10.82.090(1)(interest-bearing LFOs); RCW 10.73.160(4)(no provision for appointment of counsel); RCW 10.01.160(4)(same); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). The trial court is required to conduct an individualized inquiry prior to imposing the costs, not prior to the State’s collection efforts. *See State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013); RCW 10.01.160(3); *Blazina*, 182 Wn.2d 827.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court said, “if someone does not meet the GR34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay for LFOs.” *Blazina*, 182Wn.2d at 839. Mr. Canedy met this standard for indigency. (CP 77-79).

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

It does not appear to be the burden of Mr. Canedy to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal.

This Court is asked to deny appellate costs at this time. RCW 10.73.160(1) states the “supreme court...may require an adult...to pay appellate costs.” (Emphasis added). “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). *Blank*, too, recognized appellate courts have discretion to deny the State’s request for costs. *State v. Blank*, 131 Wn.2d 230, 252-53, 930 P.2d 1213 (1997). Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender’s financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence Mr. Canedy’s indigent status has changed since the trial court entered its order of indigency in this case. Appellate costs should not be imposed in this case.

**F. CONCLUSION**

Defense counsel failed to provide Mr. Canedy with effective assistance of counsel by failing to object to speed evidence during trial when the witnesses had no basis for their opinions.

Defense counsel was further ineffective because his closing statements diminished the State's burden of proof and encouraged the jury to convict on lower than a "beyond a reasonable doubt" standard. This closing argument constitutes ineffective assistance of counsel.

Because he was deprived of ineffective assistance of counsel, Mr. Canedy's conviction for Attempt to Elude a Police Vehicle should be reversed and remanded for a new trial.

Mr. Canedy also asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 31st day of August, 2018.

  
Jill S. Reuter, WSBA #38374

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 35915-8-III  
vs. )  
MICHAEL CANEDY ) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on August 31, 2018, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Michael Canedy  
116 SE AERIE ST  
MALDEN WA 99149

Having obtained prior permission from the Respondent, I also served the same at [DenisT@co.whitman.wa.us](mailto:DenisT@co.whitman.wa.us) and [AmandaP@co.whitman.wa.us](mailto:AmandaP@co.whitman.wa.us) using the Washington State Appellate Courts' Portal.

Dated this 31st day of August, 2018.

/s/ Jill S. Reuter  
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